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REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,

BEFORE
SIR WILLIAM PAGE WOOD,
VICE-CHANCELLOR.

By THOMAS HARE,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. XL
1853:—16 & 17 VICTORIÆ.

TOGETHER WITH
A HISTORICAL PREFACE
AND A
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LORD CRANWORTH, *Lord Chancellor.*

SIR JAMES LEWIS KNIGHT BRUCE,
SIR GEORGE JAMES TURNER, } *Lords Justices.*

SIR JOHN ROMILLY, *Master of the Rolls.*

SIR RICHARD TORIN KINDERSLEY,
SIR JOHN STUART
SIR WILLIAM PAGE WOOD } *Vice-Chancellors.*

SIR ALEXANDER JAMES EDMUND COCKBURN, *Attorney-General.*

SIR RICHARD BETHELL, *Solicitor-General.*



PREFACE

TO THE

ELEVENTH AND LAST VOLUME.

THE series of Reports now concluded contains a selection of the cases arising in one of the courts of Chancery during the twelve years from Michaelmas Term, 1841, to Trinity Term, 1853.

The Reporter is unwilling to close his labours without at least attempting to present a brief notice of some of the chief events affecting the constitution, method of procedure, and judicial business of the court, during the period over which they extend. The twelve years which these Reports embrace have not been unfruitful in the materials for such a history. The activity and magnitude of commercial undertakings have imparted to the subjects of litigation some features of great prominence, although not wholly peculiar to the time; and within the same period the constitution of the court, and its mode of administering justice, have undergone greater changes than had before occurred, since the time that the writ of subpoena was, as it is said, invented by John de Waltham, in the reign of Richard the Second.

In the care of the court to guard against the possibility of a surprise on parties brought within its jurisdiction, to enable every one interested to be heard on his own part, and to afford opportunity for inquiry into every matter bearing on the ultimate result of the cause, its procedure had become so elaborate, that—if it were permitted to set aside the considerations of time and cost,—perhaps no system could have been more perfectly fitted to secure deliberate and complete justice to suitors. Her Majesty's Commissioners for inquiring into the process, practice, and system of pleading in the court of Chancery, in their First Report observe—with what would almost have been thought irony if it

had been found elsewhere,—that “the loss occasioned by costs seems not to have been adequately appreciated in the system adopted by courts of equity.” In a judicature dealing with the claims of property, time and pecuniary expense are elements too important to be disregarded; and the spirit of recent legislation^(a) has been rather to reverse the cautious policy of earlier times, and to prefer the possible sacrifice of justice in some cases, to that of time and money in all. Nor can this be fairly stated as a reproach to the modern system. The exigencies of mankind impose limits to the degree in which its institutions are permitted to advance towards a perfection which, after all, they might never reach.

The first alterations in the practice of the court, during the period referred to, were made by the orders of Lord Cottenham, of August, 1841, which took effect the last day of the following term. They afforded facilities for commencing, prosecuting, and obtaining the fruits of a suit, by enabling the Plaintiff to enter an appearance for his adversary, and to serve certain classes of Defendants with a copy of his bill, without further process; by shortening answers in many cases; putting the case in issue by a traversing note, and readily enforcing a decree. Some of the orders were also intended to diminish the number of parties to a suit, and to determine, in an early stage of the cause, what parties were necessary.

These orders were soon afterwards followed by a measure abolishing several ancient offices,—the six clerks, sworn clerks, and waiting clerks, whose privileges were thought to interfere with the reformation in practice which it was desired to introduce, and creating in their stead the offices of clerk of the inrolments, clerks of the records and writs, and taxing masters^(b). The general rules theretofore in force governing the practice of the court, with several important amendments, were reduced into

(a) Stat. 9 & 10 Vict. c. 95, and subsequent statutes, relating to the Courts of law and equity. (b) Stat. 5 & 6 Vict. c. 103; General Orders, 26th Oct., 1842.

a code by the orders of Lord Lyndhurst, of the 8th of May, 1845. Lord Truro, in recurring, at a subsequent time, to the progress of the successive improvements preceding the commissions of 1850 and 1851, describes them as being made with the aid of the equity judges, and more especially with that of Lord Langdale and Vice-Chancellor Wigram (*a*).

In 1847, during the second chancellorship of Lord Cottenham, an act was introduced enabling trustees (*b*), (afterwards extended to the majority of their number (*c*),) to relieve themselves of future responsibility, and from the administration, of trust funds, and to pay them into court; and empowering the court (as in cases arising under acts for the deposit with the accountant-general of purchase monies of land taken for public works,) to deal with the funds so placed in its custody, by petition, without bill.

The next, and theretofore "the greatest change in chancery procedure, is that introduced by the general orders of Lord Cottenham, of April, 1850. By those, in a great number of specified cases, without any formal pleadings at all, by the filing of what is called a claim, heard summarily on affidavits, and, if necessary, on counter-affidavits, the court is enabled at once to pronounce a decree between the parties. Besides the specified cases, the court is authorised, in every case in which it thinks fit, to permit a claim to be filed" (*d*). The orders came into operation on the 22nd of May, 1850, between which time and the 12th of January, 1852, 1,969 claims had been filed in almost every variety of case; and upon these the chancery commissioners, in their Report of the 27th of January, 1852, say 863 decrees or orders had been drawn up, and 245 stood in the list for hearing.

In the session of parliament which was contemporary with these important alterations in the form of suits in equity, Sir George Turner, then a member of the house of commons for the city of Coventry, brought in a bill, which, in July, 1850, passed

(*a*) Lords' Debates, 31st July, 1851.

(*b*) Stat. 10 & 11 Vict. c. 96.

(*c*) Stat. 12 & 13 Vict. c. 74.

(*d*) Chancery Commission, First Report, p. 13.

into a law, "to diminish the delay and expense of proceedings in chancery"(a). By this Act, parties concurring in the facts of their cases were enabled to state such cases, and obtain the opinion and declaration of the court upon them; personal representatives could procure a summary order for taking accounts of the estates which it was their duty to administer; creditors might assert or dispute conflicting claims, without the formality of exceptions; and to the court, and not to the master, was assigned the duty of determining the superfluity or defects of pleadings. To accomplish so considerable an administrative improvement is not often the lot of a member of parliament, however eminently qualified for the task, who is neither in office, nor the organ of any party.

On the 11th of December, 1850, and on the 31st of January, 1851, Her Majesty's commissions were directed to several learned persons, to inquire of the amendments which might be made in the administration of justice in the court of chancery; and these were followed by a commission of the 4th of July, 1851, associating in the inquiry two eminent laymen, in "whose qualifications as men of business" confidence was reposed.

The labours of the commissioners had scarcely commenced, when a change of great magnitude in the ancient constitution of the court of chancery was accomplished by the erection of an appellate court, composed of Judges acting either conjointly or co-ordinately with the Chancellor. This fundamental alteration in the structure of the court received the sanction of parliament in August, 1851, by the statute 14 & 15 Vict. c. 83, whereby Her Majesty was empowered to appoint two Lords Justices of the Court of Appeal, to take judicial rank next after the Chief Baron, and endued with all the powers, authorities, and duties, as well ministerial as judicial, incident to the jurisdiction of the High Court of Chancery. The statute enabled either of the Judges so constituted, at the direction of the Chancellor, to sit in the place of the Master of the Rolls, or of a Vice-Chancellor, but gave no

(a) Stat. 13 & 14 Vict. c. 35.

reciprocal power to the Master of the Rolls or a Vice-Chancellor to sit in the place of a Judge of Appeal.

The necessity of relieving the Lord Chancellor of a portion of the duties of his office had been discussed for half a century. The report of Lord Eldon's commission, in 1826, described the labours of the chancellor as so manifold, that they occasioned "great delay in the business of the chancery suitor." Upon the question of the class of duties from which the office should be relieved, there had been much difference of opinion. The bill for creating the appellate court was framed by Lord John Russell, after a careful inquiry and examination of the conflicting opinions of those who were most conversant with the state of judicial business, and the conditions which the convenience and interests of suitors required; and the impartiality and candour with which the subject was treated, were acknowledged and appreciated by all parties (*a*). Still, if the constitutional historian should endeavour to trace the causes which, in 1851, suddenly awakened parliament to the immediate necessity of thus largely augmenting the judicial strength of the court of chancery, he would scarcely find them in any peculiarity affecting the court itself at that time. The main reasons assigned for the measure in the debates to which it gave rise were chiefly extraneous;—that the chancellor would thereby be enabled to devote more of his time to the hearing of appeals in the house of lords,—that he might better attend to the functions which devolve upon him as the chief minister of state for the affairs of justice; and that the constitution of the judicial committee of the Privy Council needed improvement. There is no doubt that at several times during the present century, the number of appeals before the chancellor had greatly accumulated; and that again, on the advent of some judge of extraordinary energy, or capacity for labour, the arrears of business had been disposed of: and although this was a condition in which the administration of justice ought not to have

(*a*) Commons' Debates, 13th June, 1851.

been left, yet it does not appear to have been doubted by parliament that the system was adequate to the necessities of the public; and the creation of the appellate court, except in its relation to objects foreign to the court of chancery, was not explained as obviating any permanent defect, but only as designed "to prevent a recurrence of the inconvenience which was felt to arise in the preceding year from the absence of several learned judges in the courts of equity, in consequence of illness"(a). Perhaps this, and most other successful public measures of the more useful and less dazzling character, are owing to a happy concurrence of circumstances,—a government willing to direct its attention to subjects that require great care and labour, and that, so far from promising to their authors any increase of popularity, may, on the contrary, even expose them to vulgar reproach; and which is at the same time powerful enough to obtain the assent of the legislature to such social ameliorations (b).

The report of the chancery commissioners was signed on the 27th of January, 1852, and soon afterwards laid before parliament. It recommended that, inasmuch as the statute creating additional judges had enabled the Lord Chancellor to request the assistance of a judge of one of the courts of common law (c), the practice of sending cases from chancery for the opinion of courts of law should be discontinued,—that a portion of the judicial time of the Master of the Rolls and the Vice-Chancellors should be employed in business in chambers,—the transfer to the court, so far as practicable, of the judicial duties of the masters,—the reference of special matters to conveyancing counsel, accountants, engineers, actuaries, and other professional persons, as occasion might require; and the appointment of officers having the qualifications of masters' clerks, to perform the other

(a) Lords' Debates, 13th July, 1851.

(b) Memoranda stating the judicial appointments during the time occupied by these Reports will be

found in the first nine volumes, in the page immediately preceding the index in every volume.

(c) 14 & 15 Vict. c. 83, s. 8.

duties of the Masters. The Report also recommended extensive alterations in the forms of pleading and procedure, the rules as to parties, the process of taking evidence, and the nature and measure of ultimate relief.

No time was lost in reaping the fruits of this inquiry. The royal speech, on opening parliament on the 3rd of February, intimated that Her Majesty had directed bills to be prepared founded on the reports of the law and equity commissioners. Lord Truro seems, indeed, at first, to have felt some hesitation at the extent of the changes which were proposed, adverting to them as "reversing the whole system of proceedings in chancery," and expressing doubts "how far the plan of the commissioners, as regarded the abolition of masters, could be carried out(*a*); but notwithstanding these doubts, a sketch of the heads of a bill relating to the office of master had been prepared before his lordship resigned the great seal on the 27th of February, 1852. Before that time also a Bill for the relief of suitors in the court of chancery, which related to matters not touched upon by the report, was brought into the lower house. The object of this measure was to charge the salaries of the Lord Chancellor, Lords Justices, and the Vice-Chancellors on the consolidated fund,—to regulate the office of the accountant-general, and the fees of that and other offices, as well as the manner of their perception, and to carry all such fees to the suitors' fee fund account. This became law at the end of the session(*b*).

On the resignation of Lord Truro, the great seal was committed to Lord St. Leonards, and a fortnight had not elapsed before steps were taken for effecting the chief improvements which had been recommended: nor, remembering on whom it had fallen to promote the measure, can this rapidity of action be deemed precipitate or hasty. None who ever filled the office of chancellor had less reason to hesitate in the work of reformation, for none probably could foresee more clearly the consequences of every proposal that was made. Lord St. Leonards

(*a*) Lords' Debates, 12th Feb., 1852. (*b*) Stat. 15 & 16 Vict. c. 87.

not only entered fully into the spirit which had animated the commission whose labours he adopted, but attempted to carry the improvements farther; and though opposed in some points by members of the legislature to whom it will be no disparagement to say that their knowledge of the subject was less profound than his own, it is believed that subsequent experience has tended to prove the wisdom of all the amendments which he endeavoured to accomplish.

On the 19th of April, 1852, a bill to abolish the office of master in ordinary, and make provision for the more speedy and efficient despatch of business in the court of chancery, was laid on the table of the house of lords. In framing the machinery which it was proposed to substitute for the masters, it was not forgotten that there are moral as well as material influences affecting the institutions of men,—and that although antiquated and dilatory forms might be swept away, old traditions and inveterate habits were also to be overcome. Lord St. Leonards entertained no unfounded fear, that if he contented himself with removing the masters and installing the judges' clerks in their room, he might do little else than set up a new and less perfect tribunal in the place of that which was abolished. He remarked, that "he could not well approve of a proposition contained in the sketch that had been furnished to him, by which it was suggested that the judges' clerks should have the same powers as masters in ordinary." The objections to the masters' jurisdiction, he said, "would be found to attach themselves in a still greater degree to those persons, who, although of a lower grade, might affect to be masters. They would be likely to assume the same power, and feel an independence, which was inconsistent with what he understood to be the object of the new regulation"(a). His lordship observed, that he objected to surround the judges' clerks with the atmo-

(a) Lords' Debates, 12th March, 1852. In this opinion, as to the mode of effecting the abolition, Lord Cranworth fully concurred. Lords' Debates, 19th April, 1852.

sphere of Southampton Buildings(*a*); and that every judge should have a sufficient room provided, in which the duties of the chief clerks should be performed under his own eye, and the business be conducted by personal communication. The working of the system has shewn the importance of the precaution, as well as justified its prudence. The careful preservation of the distinction between the former functions of the masters and the purely ministerial duties of the chief clerks,—constantly keeping in view that the latter is intended to be the officer of the judge rather than the officer of the court, has always been felt by the bar to be a necessary safeguard of the new system. By the bill which passed on the 30th of June, 1852(*b*), provision was made for the disposal of the offices in Southampton Buildings, and for providing chambers for the vice-chancellors, until they shall have courts with proper rooms attached to them.

Early in May of the same year a bill to amend the practice and course of proceeding in the court was introduced. By the enactment thus proposed, the recommendations of the chancery commission were adopted, with one material exception. The commissioners, it has been seen, had proposed that cases should not in future be sent from chancery for the opinion of a court of law. Upon this proposal, and upon the course taken by Lord St. Leonards with regard to it, a few words may not be out of place.

There is not, perhaps, a greater reproach to any system of law, than that which is involved in the statement that a suitor, after having availed himself of the science of its professors, and having undergone the inevitable delay, expense, and anxiety of bringing his case before the court, may still be told that he has mistaken his remedy: that true it is, he may be entitled to judicial relief, but that he has sought it at the wrong tribunal; and although the direction which should have pointed out his

(*a*) If this be hereafter read by any to whom this allusion is obscure, he may be told that the offices entered at No. 25, Southampton

Buildings, had been the laboratories of several generations of masters in ordinary.

(*b*) 15 & 16 Vict. c. 80.

course at the beginning was so dimly written, that even the experienced artists whom he had consulted could not read it,—he cannot be excused from the necessity of losing his suit, of paying his adversary's costs as well as his own, and of being compelled to abandon his claim, or recommence his process anew. Unhappily this reproach has for ages attached, and still attaches, to our national jurisprudence. The question whether the suitor had been mistaken or misled in the choice of his court has been a frequent subject of discussion in these Reports(*a*), not to advert to doubts and arguments arising out of the existence of numerous courts of exceptional jurisdiction(*b*). If, in addition to the expense of seeking relief, and the delay, it were to appear that, whilst the suitor was pursuing justice in the court into which he had been led, the period allowed by law for the prosecution of his rights had elapsed, and that thenceforth he was utterly without remedy, the commentator on such a system would assuredly be inclined to doubt whether its courts were not in truth kept up for other purposes than for the good of the people. Revolting as such an instance of the pretence, yet mockery, of justice must appear, when it is considered apart from any conventionalities of view with which it may be invested by especial prepossessions,—it was exemplified amongst us in every feature, in the case of *Knight v. The Marquis of Wa-*

(*a*) *Pearce v. Creswick*, vol. 2, p. 286; *Green v. Pledger*, vol. 3, p. 165: Cases where the equity has depended on the mode of proof. (See 3 Black. Comm. c. 27, p. 437.) *Wood v. Rowcliffe*, vol. 3, p. 304; *Whittaker v. Wright*, vol. 2, p. 310; *Jones v. Hughes*, vol. 1, p. 383; *Price v. Berrington*, vol. 7, p. 394; *Nixon v. Taff Vale Railway Company*, vol. 7, p. 136: Cases depending on the mode of relief. (See Black. Comm. ubi sup.)

(*b*) As to the statutory jurisdiction of the Court of Admiralty: *Ridgway v. Roberts*, vol. 4, p. 106; *Gibson v. Ingo*, vol. 6, p. 112; *Castelli v. Cook*, vol. 7, p. 89; *McCalmont v. Rankin*, vol. 8, p. 1; *Darby v. Baines*, vol. 9, p. 369; *Hughes v. Morris*, vol. 9, p. 636; *Brenan v. Preston*, vol. 10, p. 331. The jurisdiction of the Court of Probate: *Rendall v. Rendall*, vol. 1, p. 152; of Courts of Bankruptcy and Insolvency: *Thompson v. Derham*, vol. 1, p. 358; *In re Heath*, vol. 9, p. 616. Of visitorial (*Whiston v. Dean and Chapter of Rochester* vol. 7, p. 532); and criminal (*In re Marquis of Hertford*, vol. 1, p. 584) jurisdictions.

terford (a), where, after fourteen years of litigation, the Plaintiff was left remediless, on the ground that he should have proceeded at law, and not in equity. The case is not mentioned as one in which the decision could, according to established principle, have been otherwise; but surely the principles which admit of such a failure of justice are essentially vicious.

In the bill introduced by Lord St. Leonards, it was proposed that cases for the opinion of courts of law might be stated by the judge in chambers; and that a corresponding power should be given to courts of law, on the occurrence of equitable questions, of obtaining the opinion of a court of equity.

The step would have been a great advance towards a complete and harmonious judicial system. It would have afforded a foundation for establishing that "satisfactory means of communication" between the several courts, the want of which the common law commissioners subsequently adverted to as one of the causes of circuitry (b). It would have been the commencement of an interchange of duties, from which an interchange of powers would almost inevitably have followed. A process commenced at law, might, if the question proved to be equitable, have been made available for relief in equity; and a process commenced in equity, might, if a simple legal remedy appeared to be sufficient, have been terminated by a judgment at law;—whilst suitors would have had the benefit of the learning and experience of both courts in their several departments. The system of reciprocal aid suggested by Lord St. Leonards would at least have speedily shewn whether such an amalgamation be impracticable, or whether the objections are not in truth rather technical than substantial. The course of amendment which has been subsequently adopted, whilst it has gone far to render the modes of proof and of trial the same in each court (c), seems to have overlooked the differences in the manner of relief. It is in vain that a party in an action at law resorts to a plea or a replication on equitable grounds, if he be

(a) 2 Y. & C. 37; 4 Y. & C. 283; (c) Stat. 15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125.

b) Second Report, 30th Ap., 1853.

not able to show that every thing has been done which can be required from him. In all other cases, although he may be desirous to do every act which would entitle him to judgment in his favour,—as for example, to surrender or reconvey,—and it may be his adversary who prevents him from doing so, yet a court of law is nevertheless bound by its forms to give judgment against him (a). A large proportion of the cases in which equitable grounds have been relied upon at law, consists of attempts to show that the contract sued upon has, by some error, failed to express the true terms of the contract actually made. These attempts have been met by the argument, that the equity, if any, was first to reform the contract, and that it was therefore a species of relief which the court of law could not give (b). In dealing with this objection, the latter court has drawn a distinction between those cases in which the contract has been so far completed that nothing remains to be done but that which its judgment, when enforced, will accomplish (c), and those cases in which, if that judgment were given and enforced, something more would still remain to be done, in order completely to perform the new

(a) *Mines Royal Societies v. Magnay*, 10 Exch. Rep. 495; *Gorely v. Gorely*, 1 Hurl. & Nor. 144; *Wood v. Copper Mines Company*, 17 C. B. 561. Lord Campbell, C. J., in his judgment in *Wodehouse v. Farebrother*, 5 El. & Bl. 277, explains the impossibility of otherwise dealing with such a case,—“Where the ground for equitable relief is not a complete bar to any proceedings upon the judgment, and is not, if offered by plea, a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross-equities. We should often be without means to determine what are the proper conditions on which relief should be

given. No power is conferred on us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition; there are no writs of execution against persons or goods adapted to such a judgment; and no one can conjecture what remedy it would give against the lands of the debtor.” *Id.* 290. In ejectment it seems no equitable case is admissible: *Neave v. Avery*, 16 C. B. 328.

(b) *Luca v. Izod*, 1 Hurl. & Nor. 245.

(c) *Vorley v. Barrett*, 1 C. B., N.S., 225; *Steele v. Haddock*, 10 Exch. Rep. 645; *Wood v. Dwarra*, 11 Exch. Rep. 493.

or amended contract which is set up (a). The latter circumstances present the difficulty which was distinctly explained by Lord Campbell, C. J., in *Wodehouse v. Farebrother*; and the plea or replication on equitable grounds is, in such cases, excluded; but the difficulty is supposed not to exist in the former class of cases (b), because it is said the court is not thereby required to rectify the contract. In the arguments referring to equitable doctrines on this subject, there has been some confusion between the form and the substance of the proceeding in equity. Where the terms of a writing are in equity alleged to be erroneous, and not to express the actual contract, the first inquiry in that court is, whether there are sufficient grounds for impeaching the accuracy of the instrument, and next, what, if any, are the precise amendments which must be made in it, to express the true agreement of the parties; and these questions as to the deliberate acts and general security of mankind, compels the court to try by the severest tests of evidence (c). To ascertain the actual terms of the contract, apart from all subsequent consequences, is, in truth, to rectify it. It may be done in equity, by way of defence to a suit for specific performance (d), by an original suit (e), or by cross bill (f), but the manner of doing it is of small importance. The substantial point is to determine what is, in fact, the contract; and it is of the essence of justice that it should be clearly defined before the court proceeds to enforce it. When therefore a court of law, acting upon equitable grounds, permits some matter to be imported into a written contract which is alleged to have been by error omitted from it, to say that it does not rectify the instrument, is a puerile criticism on words. The reformation of the instrument is the first and indispensable condition, and upon the accuracy and precision with which the true terms of

(a) *Perez v. Oleaga*, 11 Exch. 506. 447, and cases cited.

(b) *Vorley v. Barrett, &c.*, ut supra. (e) *Harbidge v. Wogan*, vol. 5, p.

(c) See 1 Ves. 319, per Lord 258.

Hardwicke.

(f) *Ashurst v. Mill, Mill v. Ash-*

(d) See *Manser v. Back*, vol. 6, p. *urst*, vol. 7, p. 506.

the entire contract are elicited, must depend the justice of every subsequent conclusion upon it. The misfortune is, that the process of reasoning which the form of proceeding forces upon the court of law is the most unhappy that can be imagined. A court of equity proceeds in its inquiry whether the relative legal obligations as they stand, fail to carry out the true contract, and, if so, whether the actual terms of the contract can be so clearly shewn, as to enable the court safely to define and express them; and if these questions are both answered in the affirmative, the court rectifies the contract, with due regard to all its results, legal or equitable;—if the first alone be answered in the affirmative, it may set aside the contract, and place the parties *in statu quo*; or if one or both be answered in the negative, it may decline to interfere. Such investigations are the most difficult, and, it may be added, the most delicate and perilous, which can be presented to any jurisdiction. In such cases a court of law must try the question, whether the facts offered to it would be sufficient in equity to set aside the contract, or to amend it, and to what extent the amendment should go,—with the same elaborate care as if it were competent to cancel or reform it, avowing at the same time its incompetency to do either, and with the probability of no other result than the impotent conclusion that its judgment, whether given for the Plaintiff or Defendant, will leave the equities of the parties unsatisfied. Such fruitless inquiries are not only a waste of judicial labour, but are attended with that imperfection and discouragement which result from the suspicion that the labour will, in the end, be more or less useless, and that it may therefore be, to a greater or less extent, omitted,—an influence which the most vigorous mind cannot always escape. In *Wood v. Dwarries* (a), the Plaintiff by his replication on equitable grounds asserted facts, which he contended gave him in equity a right to recover that which he admitted the policy forming the written contract upon which he sued did not give him. If the amendment proposed by Lord St.

(a) 11 Exch. R. 493.

Leonards had been adopted, the equitable replication, instead of occupying the full court of exchequer, might, with an economy of judicial strength, have been set down and heard before one of the judges in chancery; and by a further provision, such as has been supposed, relief might have followed, either by judgment or decree (a), as the case required. In other cases which have occurred since the common law procedure act (b), in which suitors have mistaken their course (c), a power of transferring the record would have brought to issue the merits of their claims. None of the legal amendments hitherto introduced have, however, gone so far as to protect suitors from the danger of being thus misled, or to save the law of the country from the disgrace which such a cause as that of *Knight v. The Marquis of Waterford* is calculated to inflict upon it.

The clauses providing for the interchange of cases between the two courts were rejected in the commons. They were afterwards restored by the lords, but the amendment was not assented to by the lower house; and the bill without those clauses became law on the 1st of July, 1852 (d).

(a) In equity, the facts stated in the replication in *Wood v. Dwarries* would certainly not have sustained the plaintiff's title to relief; and the plaintiff would scarcely have been advised to put them forward as sufficient for that purpose. He would not have been allowed to cancel the express words of his contract by the statement, in effect, that he believed them to mean something wholly different, and which he had read on another paper that formed no part of his contract. It would not have been enough to aver that he acted on the faith of the prospectus. He must have shewn, moreover, definitely, what terms, if any, ought to have been introduced

into the policy which were not in it, and what terms, if any, ought to have been expunged from it. *Collett v. Morrison*, vol. 9, p. 162, is far from supporting the plaintiff's case. The court, in *Wood v. Dwarries*, concluded, in effect, that there was a fraud on the part of the defendants in framing the policy, and that the sum insured by it was the measure of damages. The equity allowed to the plaintiff was to sue on one cause of action, and to recover on another.

(b) Stat. 17 & 18 Vict. c. 125.

(c) See *Hunter v. Gibbons*, 1 Hurl. & Nor. 459; *Gulliver v. Gulliver*, Id. 174.

(d) 15 & 16 Vict. c. 86.

On the eve of the passing of these acts, one, who, amidst the stormy politics of his earlier life—in the dignity of judicial elevation—and in the repose of succeeding years, had not ceased to labour in the field of legal reform, congratulated the nation on the success of measures, with which, he observed, none that had ever been sanctioned by parliament, in point of importance bore comparison. In giving to their authors, in and out of office, their just tribute of praise, Lord Brougham concluded with a reflection that may be read with a feeling not unmingled with sadness:—"He was," he said, "performing what he knew to be a superfluous and, he believed, also an unpopular task—that of general commendation. What he said was little likely to meet with acceptance, either in parliament or out of doors, from those whose judgments were warped by party connexions and party views; but it was the happiness of those who act unfettered by the trammels of party to enjoy at all times the privilege which the Roman historian described as only an occasional felicity,—*rara temporis felicitas*—that of thinking as they please and speaking as they think"(a).

The statutes were followed by numerous general rules and orders, framed for the purpose of giving them full effect. On the 7th of August, 1852, Lord St. Leonards issued forty-eight orders, founded on the act for the improvement of the jurisdiction; and, on the 16th of October following, sixty-one orders, founded on the act for abolishing the office of master. These were succeeded by various rules for the purpose of completing the financial arrangements required by the act for the relief of suitors(b). The introduction of forms of procedure entirely new could not take place without the occurrence of many cases requiring judicial exposition. It appeared to the Reporter that these cases should be communicated to the profession speedily, and in

(a) Lords' Debates, 28th June, 1854.

(b) Many orders of great utility, in affording facilities for the working

of the new system, have been made by Lord Cranworth since the time of these reports and of the contemporary events.

a more compendious shape than the ordinary vehicles would permit; and for this purpose he collected and published the appendices to the ninth and tenth volumes, in which a solution of most of the doubts arising upon the new code of practice will be found.

The continual and increased resort to the jurisdiction in equity, notwithstanding a dilatory and costly procedure, which often rendered an appeal to it worse than valueless, and the long and persevering efforts for the amendment of the system, which, in 1853, met with so large a measure of success, are all significant of the public need of the jurisdiction itself. The reports of courts of justice will always exhibit, more or less distinctly, the progress of society. Judicial inquiries and decisions have, in every age, their own especial features. The chronicles of our courts of equity show, not only, as those of other courts, the advance of civilization in the new incidents which arise from day to day, but they more especially manifest the prevailing spirit of the age to which they belong. They also display the capacity and elasticity of the system, which has grown up with the transactions of mankind, and fitted itself to their complicated exigencies. The principles of equity have been found wide enough to embrace and control the actions of men in every phase of commercial or industrial life, under every novelty of association or ingenuity of device. Looking at the series of reports in this point of view, perhaps the cases which bear more especially the peculiar impress of the time are those which have arisen out of the development of the principle of association, whether in trading partnerships, or for the execution of public or private works of great magnitude, and the necessity of investing bodies of persons with what are called parliamentary powers, overriding, or at least for the time superseding, the ordinary civil rights of the subject. The questions arising from the rapid extension of railways, and their inevitable interference with private property, at one period created a legal literature of their own, and almost threatened to engross the time of the courts, to the exclusion of their common

business. In conferring extraordinary powers, the foresight of the legislature cannot succeed in contemplating every result, or in providing for every contingency; and it has frequently become necessary, in construction, to assign reasonable limits, measured by the legislative intention, to expressions of wide or universal extent, or to control such expressions by reference to that general or special design. A remarkable example of the exercise of this jurisdiction is seen in the case of *Dawson v. Paver* (a). If the court had not interposed in such a case against the words of a statute, it is obvious that the legislature would have been made the instrument of giving to the proprietors of property within a particular area an unjust advantage over their neighbours, upon whom they would have been able to inflict an injury, which there was no reason to believe the legislature intended they should suffer. On the other hand, the general rule, that powers given in express terms cannot be deemed unlawful or inequitable, is asserted in a case in which it was sought to restrict the operation of an act made for the government of local business in a particular locality, by regard to the provisions of an antecedent act made for the benefit of the same locality (b). The rule is, in fact, only a necessary consequence of the subordination of the judge to the legislator. With this restraint the case of *Dawson v. Paver* must be read, as well as the other cases in these volumes, in which the court has thought it right to limit the effect of general words in statutes by reference to the sense of the subject with which they are dealing, as *Browne v. Amyot* (c), and *Attorney-General v. Ward* (d). Of the like class is another case, which was the subject of revision in every court to which the question could be carried, and related to the extent to which Lord Tenterden's Act (e) was a bar to a suit for tithe, when the claim was not

(a) Vol. 5, p. 415.

Daves, vol. 11, p. 363, and cases cited.

(b) *Attorney-General v. Eastlake*, vol. 11, p. 227. See also *East and West India Docks and Birmingham Junction Railway Company v.*

(c) Vol. 3, p. 173.

(d) Vol. 6, p. 477.

(e) Stat. 2 & 3 W. 4, c. 100.

one which came within the inconvenience to which the act referred, and purported to obviate(*a*). The various discussions which this case underwent will doubtless tend to elucidate the application and extent of this important principle of judicial construction(*b*).

Parliament, in bestowing extensive powers upon bodies of persons, has, according to the nature and object of their privileges, imposed, expressly or by implication, corresponding duties and obligations; and it has become a subject of judicial determination whether, either against the public or individuals, or against the particular members of such bodies *inter se*, they could, either affirmatively(*c*) or negatively(*d*), escape or avoid the performance of a duty or obligation upon the faith of which the company had obtained the powers with which it was invested.

The tendency of modern trade has for some years past been towards an organization favourable to large combinations, possessing great capital, and with it the means of availing themselves in the widest degree of the advantages of a division of labour. Numerous joint-stock companies have been created, and, perhaps, are a consequence of the tendency referred to; whilst it may be, that,—if they can be established on a basis of prudence and good faith which shall inspire confidence,—they are destined to counteract the results of monopoly, by at least restoring to smaller capitalists a share of its advantages. The relative rights and liabilities of the members of such companies have, however, called for definition, and have been defined, according to the varying circumstances of each case, with a minuteness and accu-

(*a*) *Salkeld v. Johnson*, vol. 1, p. 196. See 2 D. G. & S. 749; 1 H. & T. 329.

(*b*) These cases have been selected because they are examples of equitable doctrines common both to Courts of law and equity, and are not therefore embarrassed by any

technical distinctions peculiar to either system.

(*c*) *Bagshaw v. The Eastern Union Railway Company*, vol. 7, p. 114; *Simpson v. Denison*, vol. 10, p. 51.

(*d*) *The Earl of Lindsey v. The Great Northern Railway Company*, vol. 10, p. 664.

racy for which, in earlier times, there was no precedent(a). Some important cases have also arisen affecting the constitution and existence of such bodies. An example of this kind is found in *Foss v. Harbottle*(b), where the court had to determine on that which constituted the essential elements of corporate life and action, and on the conditions which are necessary to entitle the members to treat the body as defunct. The case of *M'Bride v. Lindsay*(c) belongs to the same class.

At the same time the law affecting common partnerships has undergone great extension. The incidents flowing from the contract in its inception (d), in its progress (e), and on its dissolution (f), have been the subjects of judicial declaration. Perhaps, in no department of jurisprudence is the adaptation of equitable principles to the progressive business of mankind more evident, than in the law of partnership. It is no slight benefit for the commercial world to know that its dealings, both as to their purpose and performance, will be tried by an austere and unswerving standard of integrity (g). In considering whether the exclusion of a partner could be sustained upon the provisions of the contract, Sir W. Page Wood, V. C., said, "The court presupposes a basis of good faith, upon which all the stipulations contained in the deed must rest. The power would never be allowed by this court to be exercised in a manner against what may be called the truth and honour of the articles" (h).

(a) See *Pinkett v. Wright*, vol. 2, p. 120; *Phene v. Gillan*, vol. 5, p. 1; *Walford v. Adie*, vol. 5, p. 112; *Campbell v. The London and Brighton Railway Company*, vol. 5, p. 519; *Beckitt v. Bilborough*, vol. 8, p. 188; *Hay v. Willoughby*, vol. 10, p. 242; *Taft v. Harrison*, vol. 10, p. 489. See also the numerous cases under the Winding-up Acts, in the Reports of Mr. De Gex and Mr. Smale.

(b) Vol. 2, p. 461.

(c) Vol. 9, p. 574.

(d) *Dale v. Hamilton*, vol. 5, p. 369; *Webster v. Bray*, vol. 7, p. 159.

(e) *Blair v. Bromley*, vol. 5, p. 542; *Downs v. Collins*, vol. 6, p. 418.

(f) *Willett v. Blanford*, vol. 1, p. 253; *Fisher v. Taylor*, vol. 2, p. 218; *Tatam v. Williams*, vol. 3, p. 347; *Smith v. Mules*, vol. 9, p. 556; *Page v. Cox*, vol. 10, p. 163; *Tibbits v. Phillips*, vol. 10, p. 355; *Butchart v. Dresser*, vol. 10, p. 453.

(g) See *Wilson v. Short*, vol. 6, p. 366.

(h) *Blisset v. Daniel*, vol. 10, p. 493.

A few other decisions in these reports, involving principles of importance in the development of equitable doctrines, may be briefly mentioned. In the application of the common maxim, that those who would have equity must do equity, the court confined its discretion within the plain and constitutional limit of imposing no terms on the suitor which could not be enforced in a suit instituted for the purpose, or which, apart from forms of proceeding, would not be the just result of such a suit; and disclaimed the arbitrary and dangerous, although not unfrequently tempting power, of requiring him to submit to conditions which no legal or equitable principle would abstractedly enjoin (*a*). Not otherwise than illustrative of the same caution is another judgment, in which a husband might have been entitled to set aside a secret disposition of the property of the wife, but he was held to have excluded himself from that relief by conduct, which, before the marriage and the disposition in question, had placed her in his power, and prevented her retirement from the contract (*b*). In other cases, principles of scarcely less value, affecting the same relation of life, have been laid down (*c*); and considerations by which courts of justice might be governed in regard to it, have been carefully examined and propounded (*d*).

Many determinations have contributed to elucidate the cases that stand on the boundary line which separate acts and expressions relating to the disposition of property creating absolute rights, from acts and expressions which have not that effect, and are merely indicative of inclination, or unfulfilled intention, or are voluntary and incapable of being enforced (*e*). Cases of a very remarkable character arose upon testamentary documents, in which it was almost impossible to doubt that some

(*a*) *Hanson v. Keating*, vol. 4, p. 1. 451; vol. 5, p. 326; *Raikes v. Ward*,

(*b*) *Taylor v. Pugh*, vol. 1, p. 608. vol. 1, p. 445; *Thorpe v. Owen*, vol.

(*c*) *Cartwright v. Cartwright*, vol. 2, p. 607; *M'Fadden v. Jenkyns*, vol. 1, p. 458; *Hughes v. Stubbs*, vol. 1, p.

(*d*) *Cocksedge v. Cocksedge*, vol. 5, 476; *Meek v. Kettlewell*, vol. 1, p. 397. 464; *Fletcher v. Fletcher*, vol. 4, p.

(*e*) *Crockett v. Crockett*, vol. 1, p. 67; *Cross v. Sprigg*, vol. 6, p. 552.

expressions or instruments were but repetitions, and were not meant severally to take effect(*a*), or were but the inchoate mark of an intention which was never perfected(*b*), or that some expressions were used by inadvertence(*c*). In following the authority of another class of cases, in which it may be said that the court has assumed something of a legislative power, the jurisdiction has been limited so as to sustain and give effect to the clear intention of the act or instrument to the extent permitted by law, and without defeating any part of that intention which is consistent with law(*d*). The rules affecting the duties and obligations of creditors in relation to the rights of sureties, have been inquired into, and defined, in circumstances which had not been previously the subject of decision(*e*). And in ascertaining if the title of a purchaser ought to be protected, by the question whether he had notice of a paramount title, and pursuing the nature and existence of his information on this point through the intricate labyrinth of a highly artificial and complicated system of property, the simple principle was elicited and affirmed, that one party to a contract is not necessarily bound to assume the statement of the other to be false, in a matter as to which he has the power of verifying its truth but does not do so; and that he is not to be constructively affected with notice of a deed which that statement misrepresents. It affirmed, in fact, that negligence is to be imputed to none, merely because he does not act on a principle of universal suspicion and distrust(*f*).

It would be tedious, as it is unnecessary, to extend these remarks further than to shadow forth the outline of that chapter in the legislative, judicial, and public annals which this series

(*a*) *Lee v. Pain*, vol. 4, p. 201;
Suisse v. Lord Lowther, vol. 2, p. 424.

(*b*) *Mayor, &c. of Gloucester v. Wood*, vol. 3, p. 131.

(*c*) *Walker v. Tipping*, vol. 9, p. 800.

(*d*) *Vanderplank v. King*, vol. 3, p. 21; *Monypenny v. Dering*, vol. 7, p. 568.

(*e*) *Newton v. Chorlton*, vol. 10, p. 646; *Hollond v. Teed*, vol. 7, p. 50; *Mackintosh v. Wyatt*, vol. 3, p. 562.

(*f*) *Jones v. Smith*, vol. 1, p. 43.

of reports may, however slightly, illustrate, or to indicate the nature of some of the principal subjects with which, during the period they comprehend, it was the business of our courts of equity to deal. These examples, however imperfect and fragmentary, may not be useless as a contribution towards an arrangement of the abundant materials to be gathered from the equity reports for a history of this branch of jurisprudence. Expounders of the system have, for the most part, endeavoured to shew that the principles of equity are not to be sought in the field of philosophy or of morals; and in this they are, perhaps unconsciously, the disciples of him who defines all justice as nothing more than the embodiment of power. Equity, says Blackstone, is equally with law an artificial system, and one which neither Grotius nor Puffendorf, nor any of the great masters of jurisprudence could, by their own light, discover; and he describes the jurisdiction as derived from the imperial and pontifical formularies, and erected amongst us by the clerical chancellors and keepers of the king's conscience, upon a basis of false and fictitious suggestions(a). The chancery commission of 1826, composed of some of the most eminent equity, civil, and common lawyers of the day, apparently accepted this view of its foundation. By their report(b) they advert to the defects of the system as "owing to the circumstances under which the court of chancery was first established;" and, after mentioning the dilatory process by which alone a suitor could obtain a decree against a contumacious defendant, add, "if in the infancy of courts of equity all the caution which this long series of proceeding implies could be considered necessary, in order to *soften down* the objections to the jurisdiction itself, it can scarcely be requisite," they conclude, that the suitor should still be so incumbered. From a picture which holds up the courts of equity to view as worming themselves, by a timid, crafty, and insidious policy, into a constitution where they were intruders and aliens, it is refreshing to turn to

(a) 3 Black. Comm. c. 27.

ordered by the House of Commons

(b) Dated the 28th Feb., 1826, and to be printed 9th March, 1826.

another picture, which exhibits the institution in a worthier aspect, and with deeper historic truth. A late essay by a moralist and divine (*a*) discovers in the science of equity, and in its birth, something more than technicality and cunning. Equity he regards as one of the attributes of imperial power, which, whilst it emanated from Rome or Constantinople, might ultimately be reduced from the highest theoretical standard to the measure of the imperial will; yet, when it became embodied in the Gothic king and polity, and combined with their reverence for personal rights, as having asserted a power and majesty not unworthy of its name. Equity, amongst us, has always had too much vitality within it,—has been too conversant with action, and too inquisitive into motive,—to become the mere creature of artifice or the arbitrary expression of authority. The judge or the counsel may rest upon or take shelter under some precedent, whilst they are looking beyond it to a principle, either implanted in the conscience or founded on a more or less comprehensive argument or sense of utility. No equitable doctrine which has not its root in an enlightened morality can be venerable or lasting. Every positive system must, indeed, allow of many artificial qualifications, for the narrow limits of human discernment in the search after the veritable, and the extent of that human infirmity which is always ready to mislead or pervert its inquiries, render it impossible constantly to resort to first principles; but it should not be forgotten that the qualifications are the exception and not the rule; and upon the wisdom with which such exceptions are framed—excluding all which are not essential to the ends of justice—does the excellence of every positive system of jurisprudence depend. Of equity it may be said, in the words of the writer last quoted, that “the idea of a law which is deeper than a law written upon tables of stone, and yet which does not in anywise displace or contradict that law, but fulfils the purpose of it, is so worked into the heart of Christian ethics, that it was

(*a*) By the Rev. F. D. Maurice, M.A. *Papers of the Juridical Society*, vol. 1, p. 313. Lond. 1857.

impossible it should not affect the order of a society into which Christianity had deeply penetrated”(a). “And,” as he adds, “certainly a deep and settled belief that law and equity have both their foundation in principles of morality and reason, and that each sustains the other—positive laws implying a justice or equity which they can but imperfectly express—equity continually referring back to fixed letters and forms as a witness against the caprice of judges and rulers, and as a protection from it—has been the strength of the English character, and has given a stability to our nation which nothing else could give.”

The commissioners who were called upon to advise the crown on the amendment of the common law, reported that the consolidation of the elements of a complete remedy in the same court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of jurisprudence(b). It has been seen how far short of this object all attempts at amendment have hitherto fallen. The fusion of the several jurisdictions has gone little further than to add to that which was artificial in the court of chancery, the not less obscure technicalities which are peculiar to the courts of law. It may be feared that the difficulties it has created are not much less formidable than those which it has removed. It is not easy to say whether our jurisprudence has been made more rational: it is certainly less consistent.

A distribution of judicial powers which shall enable every court to do complete justice between the same parties in respect

(a) *Id.* p. 320.

(b) Second Report of the Common Law Commissioners, 30th April, 1853. They justly require a complete redress “in respect of the same subject matter.” It is a question of no little difficulty to determine when the subject matter of two claims ought to be treated as the “same.” See *Stimson v. Hall*, 1

Hurlst. & Nor. 835; and see the observations of the learned judge on “natural equity.” Compare *Fisher v. Baldwin*, ante, vol. 11, p. 353, and the same case before the Lords Justices (22 Law Journal, 966); who seem to have thought it one in which equitable relief might be given.

of the same subject matter, is nevertheless an object to which future legislation must tend. It may be attained by making the several courts ancillary to each other; towards which the proposal of Lord St. Leonards pointed. It may be attained by combining legal and equitable jurisdiction in the same court, to which the late amendments seem to be directed. In either case the administration of justice must be disencumbered of many of the artificial restrictions which will cease to have any value or significance when it is no longer vested in courts having divided functions. Questions will arise requiring the application of equitable principles which are not to be found in the reports. It is not too much to suppose, that there are depths which the judgments of Lord Nottingham and Lord Hardwicke and their successors have not exhausted. In the development of equitable doctrines through the medium of divers courts invested with new powers, it will become of paramount importance to distinguish the substance from the form, and constantly to recur to those sources, pure and undefiled, from which the maxims of all true equity must spring.

T. H.

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REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT.,
VICE-CHANCELLOR:

COMMENCING IN

EASTER TERM, 16 VICT. 1853.

EDWARDS *v.* HALL

1853.

*April 28th,
30th & May 7.*

THE questions in this cause arose under the will of *Jane Cook*, spinster, dated the 5th of June, 1850, the material parts of which were as follows:—

“I give and bequeath all my personal estate of which I

The testatrix directed her executors to apply such part of her residuary estate as by law might be le-

gally applied to such purposes, in the endowment of district churches or chapels in populous parishes, in order that the poor might have the Gospel preached to them in this country, adding that she wished a preference to be given to the parishes of which the churches were under the patronage of certain trustees.

Held, that the bequest created a trust for the endowment of churches and chapels already in existence, and also of churches or chapels thereafter to be built, whether upon sites already in mortmain, or which might thereafter be acquired and brought into mortmain.

That the words “endowment of district churches or chapels” meant, not an endowment by the purchase of land, nor an endowment by the building or repair of the fabrics of churches or chapels, but by making a provision for persons connected therewith or officiating therein.

A bequest of a fund for building a school, almshouse, or other charitable institution, not expressing that it is to be erected on land already in mortmain, or not otherwise excluding the necessity of acquiring land for the purpose of carrying out the trust, is construed as in effect a direction to purchase land, and is void under the stat. 9 Geo. 2, c. 36; but if it be not in any event necessary, in the execution of the trust which the bequest attempts to create, that land should be purchased and brought into mortmain, and the trustee has the option of performing the trust without that consequence, the bequest is not within the statute, and is valid.

Consideration of bequests which, although they do not create trusts for the purchase of land to charitable uses, yet do attempt to create trusts which cannot be performed unless land be brought into mortmain by other means, and which are therefore inducements to such disposition of land, and have been held to amount to a fraud upon or an evasion of the statute.

1812.
 No. 1138
 Hall
 Inquest.

may be possessed by my executors in trust, to be disposed of by them in the manner hereinafter mentioned. I direct them to invest in their names such a sum of sterling money as will purchase the sum of 2500*l.* 3½ per Cent. Reduced Annuities, and to pay the dividends thereof as and when received unto *Jane Hill Walker*, of "do." for her separate use." Then followed a gift of the same sum, at the decease of the said legatee, to her son and daughter. The testatrix then proceeded:—"I direct my executors to transfer to the trustees for the time being of the Society for Promoting Christianity among the Jews, all the 3 per Cent. Consolidated Bank Annuities which at my decease shall be standing in my name in the books of the Governor and Company of the Bank of England, the dividends thereof to be applied for the general purposes of the Society; but I earnestly recommend to the Committee of such Society not to expend the capital thereof, or any portion thereof, unless for extraordinary contingencies, but to consider it as a reserve fund, and from time to time as soon as convenient to replace and restore any portion which may have been used. I direct my executors to transfer to the Treasurer for the time being of the Institutions or Societies after mentioned, the following sums of 3½ per Cent. Reduced Annuities: viz. 'To the Operative Jewish Converts Institution, 1000*l.*;' 'To the Episcopal Jews Chapel Abrahamic Society, 2000*l.*;' 'To the Trinitarian Bible Society, 2000*l.*;' 'To the Church Missionary Society, 5000*l.*;' 'To the British and Foreign Bible Society, 5000*l.*;' 'To the Malta Protestant College, 1000*l.*;' 'To the Edinburgh Bible Society for the distribution of Gallic Bibles and Testaments in the Highlands and Islands of Scotland, 1000*l.*;' and 'To the Irish Society of London for the distribution of Bibles, Testaments, and Common Prayer Books in the Irish language and character amongst the Irish-speaking population of Ireland, 1000*l.*:' all which sums I direct shall be applied by the Managers or Committees of the said respective Institutions or Societies (in furtherance of the objects of such institutions or societies) respectively; and should I not

have sufficient $3\frac{1}{4}$ per Cents. at my death to answer such bequests, my executors shall purchase the deficiency from my other personal estate legally applicable to the purposes aforesaid. And I give the following legacies of sterling money: viz. To the Right Reverend *H. Gobart*, Bishop of *Jerusalem*; the Reverend *John Nicolayson*, Minister of *Christ Church, Jerusalem*; and *John Christian Richard*, now or late of *Palestine-place, Bethnal-green*, in the county of *Middlesex*, clerk, the sum of 200*l.* each, for their own respective use, as tokens of my esteem and regard. To each of my executors hereinafter appointed the sum of 300*l.*, as some compensation for the trouble they will have in the execution of the trusts of this my will. And I specifically will and direct that the legacies of sterling money hereby given shall primarily be charged on, and come out of such part of my personal estate (if any) as in its nature cannot legally be bequeathed for charitable purposes. And I further will and declare, that all the said transfers shall be made, and legacies paid, within three months from the time of my decease; and as to the legacies of sterling money, free of legacy duty. . . . And as to the residue of my personal estate which shall not be otherwise disposed of by me, I direct my said executors, as opportunity may offer, to apply such part or parts thereof as by law may be legally applied to such purposes, in the endowment of district churches or chapels in populous parishes, in order that the poor may have the Gospel preached to them in this country. And I wish a preference given to those parishes the churches of which are under the patronage of the trustees of my late friend, the Reverend *Charles Simeon*, and other similar trusts." The testatrix then appointed the Defendants *Hall, Browne*, and *Frampton*, her executors; and the will concluded with the following passage: "And as to my real estate, and those parts (if any) of my personal estate inapplicable by law to the purposes aforesaid, and not herein disposed of, I at present make no disposition."

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Statement.

1851.
 EDWARDS
 v.
 BART.
 Statement.

A claim for the administration of the estate of the testatrix was filed by some of her next of kin; and the other next of kin, formed by the Master was made a party to the proceeding.

It appeared that the estate of the testatrix amongst other things consisted of 34,788*l.* 3*q* per Cent. Annuities (value on the 11th of February, 1851, the day of the testatrix's death, 34,439*l.* 4*s.* 4*d.* : 500*l.* Bank Stock (value at the same time, 1075*l.* : 27,009*l.* 5*s.* Consols (value at the same time 26,121*l.* 16*s.* 6*d.* : eight 100*l.* shares in the Oxford Canal Navigation Company (i) (value at the same time 1280*l.* : ninety-nine 100*l.* shares and sixty-three 50*l.* (or half) shares, eight 25*l.* (or quarter) shares and four 12*l.* 10*s.* (or eighth) shares in the Grand Junction Canal Company (value at the same time 8246*l.* : 177 Preferential Stock in the Grand Junction Canal Company, created under the General Canal Act of the 10 & 11 Vict. c. 94. and the Companies Clauses Consolidation Act, 1845. (value at the same time 1947*l.* : twenty 100*l.* shares in the Grand Union Canal Company (value at the same time 480*l.* : 146 50*l.* shares in the Grand Junction Waterworks Company (value at the same time 10,074*l.*.) and the sum of 876*l.* due for dividends thereon accrued up to the 12th of December, 1850; 860*l.* 13*s.* 1*d.* cash, due from *John Brogden* and *John Brogden*, the younger, for the purchase of the shares and interest of the testatrix in the Ulverstone Canal Navigation Company and Canal Warehouse of the said Company, including monies advanced by her to the Company on mortgage of the said *Ulverstone* Canal; two 100*l.* shares in the Oxford Gas-Light and Coke Company (value at the same time 560*l.*) The sum of 12,000*l.*, the amount of the purchase money of estates in the county of *Buckingham*, by agreement of the 25th of July, 1848, contracted to be sold to *Sir Harry Verney*, Bart., together with rents and profits of the said estate, due at and apportioned up to the day of

a, See *In re Langham's Trust*, 10 Hare, 446.

the death of the said testatrix. The purchase money of estates in the county of *Buckingham*, contracted to be sold by the testatrix to *Francis Smith*; the sum of 52*l.* 4*s.*, the balance of purchase money of a plot of land at *Charlton Kings*, contracted to be sold by the testatrix to *Samuel Higgs Gael*, Esq.; furniture, &c. (value at the same time 260*l.* 0*s.* 6*d.*); arrears of rent due to the testatrix at the time of her death 164*l.* 11*s.* 1*d.*, whereof the sum of 67*l.* 13*s.* had since been received, and the remainder whereof was alleged to be bad; the sum of 10,139*l.* 12*s.* 6*d.* cash, standing to the credit of her account with the City of *Gloucester* Bank; and two sums, 29*l.*, and 20*l.* 4*s.* 4*d.*, due from other persons.

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The chief questions were as to the operation of the statute 9 Geo. 2, c. 36, on the bequests.

Mr. *Rolt* and Mr. *Bevir* for the Plaintiffs and the Defendant, the next of kin.

Argument.

Mr. *Wigram* and Mr. *Cole* for the executors, and also for the heir at law of the testatrix.

Mr. *Wickens* for the Attorney-General.

In addition to the authorities mentioned and commented upon in the judgment, the following cases were cited: *Pritchard v. Arbonin* (a), *Giblett v. Hobson* (b), *Attorney-General v. Hull* (c), *Incorporated Society for Promoting the Enlargement, Building, and Repairs of Churches and Chapels v. Barlow* (d), *Pelham v. Anderson* (e), *Attorney-General v. Hodgson* (f), *Kirkbank v. Hudson* (g).

(a) 3 Russ. 456.

(e) 2 Eden, 296.

(b) 3 My. & K 517.

(f) 15 Sim. 146.

(c) 9 Hare, 647.

(g) 7 Price, 212.

(d) 17 Jur. 217.

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 Evesham
 Hall
 Judgment

Amount of rent
 due to a tes-
 tatrix at her
 decease, and
 and within the
 restriction of
 the 3 Geo. 2.
 c. 36, and will
 pass under a
 bequest for
 charitable
 uses.

The VICE-CHANCELLOR held that the amount of rent due to the testatrix at her decease formed a part of the pure personality; but that the value of the real estate, contracted to be sold to Sir Harry Verney, which accrued due between the time of her death and the 25th of March, 1852, the time fixed for the completion of the purchase, belonged to her heir at law.

VICE-CHANCELLOR:—

This case arises on a bequest in the will of Miss Jane Cook, with reference to a particular portion of her residuary estate, which is in these words:—

“And as to the residue of my personal estate which shall not be otherwise disposed of by me, I direct my said executors, as opportunity may offer, to apply such part or parts thereof as by law may be legally applied to such purposes, in the endowment of district churches or chapels in populous neighbourhoods, in order that the poor may have the Gospel preached to them in this country. And I wish a preference given to those parishes, the churches of which are under the patronage of the trustees of my late friend the Rev. Charles Simeon, and other similar trusts.”

That is the whole of the bequest on which this question arises. It has been contended, on the part of those who are interested in the personal estate of the testatrix, that in effect this is a bequest which is invalid under the Statute of Mortmain, and that they are entitled therefore to treat the testatrix as being intestate with reference to the particular property which would be otherwise applicable to such bequest.

The question which has been thus raised is one which is more or less borne upon by a vast number of cases

which have been cited; and I have found it necessary to go at length not only into the cases that were cited, but also to examine many others, and to extract as far as possible what appear to me to be the principles with reference to bequests analogous to that which I have now under consideration before me, although I shall not now do more than state the result of the investigation I have been led into.

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In the first place, however, before referring to the authorities, it is I think right to state the conclusion to which I have come as to the construction to be given to the terms of the bequest itself, upon which several points have been suggested; the principal point being, that it is an endowment of churches hereafter to be built,—something also being said as to the construction which might be given to the word “endowment.” Endowment, it is said, may mean providing a repair fund, or it may mean an endowment in land; and further, that, taking the whole construction of the bequest together, it is applicable, and only applicable, to churches hereafter to be built; or at least if that be not the construction, that it is applicable both to churches already built, and to churches to be hereafter built.

The conclusion that I have arrived at as to the construction to be given to the word “endowment” is, that the more natural as well as the legal sense of the term endowment is, a personal provision to be made for a person connected either with a church or with a school, or for persons living in almshouses, as the case may be. In all such cases the endowment is some personal provision to be made for the several parties; and it is not to be attributed in this will, there being no particular words forcing one to do so, to the endowment in any sense of the building itself for the purpose of maintenance or repair. I read this expression as contemplating an endow-

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 —
Judgment.

ment for the personal provision of the party,—that being the sense in which it is treated in the earlier statutes referred to by Mr. *Wigram*, and being the ordinary sense in which it is found in many of the cases that have been cited, as well as the legal and popular sense; there is no doubt such an endowment may be in land, but there is no necessity that it should be in that form. It is used in the sense of a personal provision with reference to the mode of perpetuating the application.

Then as to the district churches to which it is to be applied the words are general; and it has been argued on the one side that it is only applicable to churches already in existence, and on the other that it is applicable to churches hereafter to be built. I have come to the conclusion that it is applicable to both. I do not think it can be confined to churches that are actually built—there is nothing in the words strictly so confining it; and the illustration which has been given, that, when a class of objects is named, it applies to a class in esse at the death of the testatrix, rather than prospectively to a class thereafter to be called into existence, I think can hardly be brought in aid of the construction of a bequest of this particular description. But further than that; the words are, “I direct my said executors, as opportunity may offer, to apply such part or parts thereof,”—looking, as it seems to me, at the constitution of a future trust, to take effect at any time when the opportunity, as she describes it, might offer. Now, as to its being confined to churches hereafter to be built, the argument that is used is this,—that every district church in esse must have some endowment; and I believe in point of fact that is so. It is to apply to a district church. In one sense no church already built can exist which has not got some endowment, inasmuch as it is a rule laid down by the Bishop, that he will not consecrate a church unless some endowment has been provided; and

the only exception, it has been said, is the case of churches in an incipient state of construction, on land already purchased and acquired in mortmain, and about thereafter to be constructed, but not so constructed at the time of the death of the testatrix. If that were the only ground for saying that validity can be given to the bequest by applying it to a particular class of churches, I should certainly not be inclined to uphold the bequest upon such a construction. It is true, as Mr. *Rolt* observed, that the words "further endowment" would be a more applicable phrase, with reference to churches which already possess some endowment, than the word "endowment" simpliciter. Yet I think it would be rather a forced and narrow construction of the will, to say, that, when a person is charged to employ money for the endowment of district churches generally, without any especial indication of a particular class, he could not properly apply that fund in aid of any further endowment of churches. Another argument, in support of the same view of the case of the bequest being only for future churches, was drawn from the expression of the testatrix, that she wished to have "the Gospel preached" in them; but as regards all district churches, they have the Gospel preached in them. That argument, however, goes too far; for the testatrix also directs that a preference should be given to the parishes, "the churches of which are under the patronage of the trustees of her late friend, the Reverend *Charles Simeon*." Now I have no doubt as to this lady's views and meaning, that she would be of opinion that the Gospel was preached in all places where the influence of those trustees was in operation, and she would not, therefore, under the term of "the Gospel being preached" mean that something new was to be done, but would merely mean that there was to be further aid. She might possibly mean this: "although the Gospel is preached, I wish it to be more largely preached, and I intend further aid to be given for that

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—
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purpose." She does not say, "further preaching of the Gospel" any more than "further endowment," but simply expresses a wish that there shall be an endowment. I think, that the true construction of the whole instrument is, that it creates a trust to employ the monies given to these parties in payment of stipends to the incumbents of all churches, whether now built or to be hereafter built; and the question is, whether that is or is not a valid bequest.

Now the principal stress of the argument against the validity of the bequest is this, that it is analogous to the case of erecting a school or a hospital, no particular lands already in mortmain being pointed out for that purpose. In order to see how far the bequest is justly open to this observation, I have thought it right to look through the various authorities which occurred in the earlier stages of this species of inquiry. These authorities were somewhat conflicting,—but the rules have I think now become settled upon a complete and uniform basis; and I have found the following to be conclusively established:—

First—That a gift to erect a school, an almshouse, or other building of that description, involves an express direction to procure land for that purpose. The first case in which that is laid down is the case of the *Attorney-General v. Hyde (a)*, which was decided by Lord *Apsley*. There was a case before Lord *Hardwicke*, of the *Attorney-General v. Bowles (b)*, in which, on a bequest of that description to erect a building, he held, with Lord *Apsley*, that the bequest meant getting the land also for the purpose of erection; but he was of opinion in that case, that, as land might possibly be got which was already in mortmain, or the building whatever it was might possibly be erected

(a) Amb. 751.

(b) 2 Ves. 547.

on some site without the acquisition of any new land,—that although there was involved a direct and express trust to procure land, it did not necessarily involve a direct and express trust for that immediate purpose. In that respect it is clear that the case of the *Attorney-General v. Bowles* has been considered by all the subsequent authorities to have gone too far. This is particularly apparent in the next head which I shall refer to, which includes the cases by which it is now established, that, if there be a simple direction to erect—and there is nothing said as to how or where the land is to be procured—there is involved a direct trust to build; and in consequence of no land being pointed out, it must be held that the testatrix was indifferent as to whether the land was to be so purchased; and that the trust is illegal, because it involves directly a trust for building on land which might be acquired in mortmain.

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 —
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The second rule is, that a gift to erect a building which does not point to land already in mortmain, and which does not exclude distinctly the power of purchasing land, is void. That is laid down by Lord *Eldon*, in the case of the *Attorney-General v. Davies* (a); not there laid down for the first time, but stated by Lord *Eldon* to have been the common sense rule, which at last had been arrived at after some conflict of decision. He lays it down, that, if the testator says, "I desire a building to be erected for a charitable purpose," or, if he says, "I desire the land to be bought," and he does not distinctly point to some land already in mortmain, so as to exclude the possibility of its being applied to bring land into mortmain, then the bequest is void.

There remains, also, this point, which I consider a third rule now established by authority, that, if there be a gift to

(a) 9 Ves. 535.

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trustees, with an option to apply the money for the purpose of building on land already in mortmain, or for the purpose of acquiring land, then that option being given the trust is good,—the charitable bequest does not fail because there is one alternative which the law will not permit. That is distinctly laid down in an early case before Lord *Hardwicke*, which has been more than once referred to in subsequent authorities. It is the case of *Sorresby v. Hollins* (a), in which there was a bequest to parties for the benefit of the poor, to be applied either in buying lands or otherwise, as the executors should be advised: and Lord *Hardwicke* held that such a trust was a valid bequest, notwithstanding the Statute of Mortmain. Lord *Alvanley* had occasion to consider that in the case of the *Attorney-General v. Whitchurch* (b); and he there says, although Lord *Hardwicke's* doctrine in the *Attorney-General v. Bowles* has been shaken by the subsequent authorities, as to the case where, admitting that the object was to erect a building on land, he threw out a suggestion that it might yet be supported on the possibility of land being otherwise acquired; yet he considered it was not shaken as to the opinion given in *Sorresby v. Hollins*, that, where there was a discretion vested in the trustee to take one of two courses, the one consistent with the statute and the other inconsistent with it, the validity of the bequest might be sustained.

We come, then, to another, and a fourth point, which is of a different description, and proceeds on different grounds from any of the preceding rules, which I consider to be settled. The cases which fall under the three preceding rules were cases in which it was held, that the due execution of the trust involved necessarily the purchase of land. But there is a fourth class of authorities (which was

(a) 9 Mod. 221.

(b) 3 Ves. 141.

the case before Lord *Eldon*, in the *Attorney-General v. Davies*), and which is of this description,—a gift to others for building, provided they will find the land. That clearly did not involve in the execution of the trust anything to be done by the trustee himself, which would be within the terms of the Statute of Mortmain ;—but what Sir *William Grant* said in that case, and Lord *Eldon* admitted in affirming his decision on appeal, was this :—“ If you give money in this way, it is nothing more or less than directing a purchase to be made by your executors of land. You may use this phraseology, and say, ‘ I will give you this sum of money, if you will give the land,’ and the money may be worth much more than the land ; for you may have a more extended object than the purchase of the land. But pro tanto, a portion of that money is given to the parties for the purchase of the land which they were so to hand over ; and it is in effect, if not a direct infraction, at least a plain and palpable evasion of the policy of the law of mortmain.”

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So far the cases have proceeded down to the case of *Trye v. The Corporation of Gloucester* (a) ; and until that authority, I do not think any case had proceeded further. It was said that the cases have laid down this,—if you direct a building, a hospital, a church, or a school to be erected, it involves as a necessary consequence the purchase of land for the purpose, if you do not point out land in mortmain by your will on which the erection is to be made, or if you do not exclusively negative the power of the trustees to purchase land ; either of which alternatives, up to *Trye v. The Corporation of Gloucester*, it was thought was sufficient. In the absence of both of these alternatives the bequest would be taken to be one which was to be executed in the ordinary form ; and if it were to be executed in the ordinary form, it would involve the necessity of the trustees

(a) 14 Beav. 173.

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buying land, and therefore it is void. In *Trye v. The Corporation of Gloucester*, the case most relied upon was *Mather v. Scott* (a) before Lord *Langdale*. In that case, the bequest was accompanied with a wish that the trustees would entreat the lord of the manor to grant some land. Now what Lord *Langdale* said there was, that the direction in the will did not exclude the power of the trustees to purchase land; and so far it went distinctly within the other authorities. It was a direction to build; there was a direction to entreat somebody to give the land, but there was no direction that in the event of their not so obtaining it they were not to get it, and therefore the due execution of the trust would be by procuring some other land, in the event of the land referred to not being obtained: if so, the case was within the previous authorities. Lord *Langdale* at the same time said, that any thing which induced parties to give land in mortmain, he conceived, would be in itself an infraction of the statute. That was said during the judgment; but the judgment itself was rested upon this, that there was nothing which excluded the power of the trustees to buy.

Then came the case of *Trye v. The Corporation of Gloucester*, which went a step farther. There was a direction that the money should be applied to certain charitable objects "if land were given or granted," those were the words, "within ten years, by the Corporation of *Gloucester*;" and there was also a clause expressly negating the power of the trustees to purchase. In that case the Master of the Rolls, after reviewing the authorities, came to the conclusion, that that which was a direct inducement to parties to bring land into mortmain was within the principle of the statute. The term inducement may require to be qualified; I do not, however, find it necessary in any way to dispute

(a) 2 Keen, 172.

the authority of that case in dealing with the case which is now before me. I merely notice as a fact, that it goes a step farther than any case hitherto decided had gone, inasmuch as up to that time I have not found any authority which says that where there is an express negative given to purchase land, it shall still be held to be a trust which is void within the statute. The case of *Trye v. The Corporation of Gloucester* may be supported on the manifest ground of evasion, but that is a totally different principle from those on which the other cases were decided.

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Now, independently of the question of manifest evasion and fraud, on which I think the cause of *Trye v. The Corporation of Gloucester* was put, the principle with regard to any other direction for investment of land in mortmain is clearly laid down in the case of the *Attorney General v. Williams* (a). Money was there given to trustees for and towards the establishing of a school,—not the erection of a school,—but the establishing of a school in the parish of *Trelech a Bettws*, in the county of *Carmathen*; and the donor directed that “no part of the dividends and proceeds should be applied to buy victuals, drink, or lodging for the said scholars.” There was no school in the parish at the time of the death of the testator; and it was in that case argued by the Solicitor-General, that the duty of the trustees in carrying out the direction to establish the school independently of the statute, would have been to buy land, and build the school upon it; and that the Court must look at the case independently of the statute to arrive at what was the general intention, and then apply the statute, and say if the general intention be or be not conformable to or consistent with the law; and he contended, that the intention was clearly invalid when the statute came to be interposed, and that the trust therefore wholly failed, no particular land

(a) 2 Cox, 387.

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already in mortmain being pointed out. What the Lord Chancellor in that case says is this, "He perfectly agreed with the Solicitor-General with respect to the construction of wills in these cases, and that the Court would not alter its conception of the purposes of the testator merely because those intentions happened to fall within the prohibitions of the Statute of Mortmain; but the rule did not apply to this particular case, for here the testator had so particularly directed the manner in which the fund should be applied, that before the statute it would have excluded the possibility of the Court's applying any part in purchasing land or building." And he says, "the testator expressly declares that no part of the dividends and proceeds shall be applied for victuals or lodging;" and then he referred to that as his ground for coming to the decision that the school was to be established.

In determining a question of the validity of a bequest attempting to create a charitable trust, with reference to the stat. 9 Geo. 2, c. 36, the construction of the gift, and the manner in which the trust ought to be executed, are first to be determined, without regard to the operation of the statute; and then it is to be seen whether the statute interposes a bar to the creation or due execution of such a trust.

The view taken by the Court in that case appears to me to be the true view, (independently of the question of actual evasion), which should be taken in every case in which there is a bequest made for a charitable purpose. You are first to see what would be the construction of the will, wholly independent of the statute; and then, having arrived at the fair and proper construction of the trust, and at the due form of its execution independently of the statute, to see how far the interposition of the statute has presented a bar to the execution of the trust. In this case, I find a trust to endow district churches or chapels, which I have already held to mean the payment of stipends to the clergymen for existing churches. Then I have to ask myself, whether, on a trust to endow an almshouse, church, or school, if the statute were out of the way, the Court would require or allow the trustees to build it. I have little doubt of the answer to be returned to that question, that a direction to endow would never authorise a building. They would not be authorised to build for the purpose of endowment. They

must endow what they find existing. I hold the bequest to apply to existing or future churches. The trustees may endow existing or future churches; but upon no construction, if the statute were out of the way, would any portion of this money be allowed to be applied to the purpose of building. Erecting a building necessarily involves the purchase of land for that purpose. The word "establishing" has been held in two or three cases to do the same, but the word "establishing" is not so strong a word by any means as the word "erecting." The *Attorney-General v. Williams* is an instance; and a case that was cited, which was before the Vice-Chancellor *Knight Bruce*, is another case of that description, in which he held "establishing" not to mean material and physical building. "Erecting" is a clear word implying the physical erection of the building; "establishing" is a dubious word, it may be established one way or the other,—but "endowment" seems to me to be a word not sufficiently flexible for the purpose of building, or one that can be applied to so material a thing. It simply involves the payment of the stipend to the party, or the allowance to the alms-people, or whatever other case the endowment may be applicable to.

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A trust to "endow" a church, school, almshouse, or other charitable institution, would not be executed by the application of any portion of the fund in building; but whether a trust to "establish" such an institution would include the building,—*Quære.*

It was then said, that, if this be not in any way a direct trust for building, it is still, within the principle of *Trye v. The Corporation of Gloucester*, an evasion of the statute, as holding out a direct inducement to bring land into mortmain. Mr. *Rolt* felt the difficulty, while arguing this case, in relying on words so indefinite as "induce" to bring land into mortmain, and even qualified the word "direct." He preferred at one time to adopt the expression (which I have adopted myself) found in the *Attorney-General v. Williams*, of there being a direct and due execution of the trust; and he cited for that purpose a case that was before Vice-Chancellor *Kindersley*, of *Longstaff v. Rennin-*

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son (a), in which there was a trust for the better establishment of any schools built or to be built. It turned out that there were none actually built; and the Vice-Chancellor conceived, that, under those words, it would be a direct execution of the trust to direct the building of schools,—there being none then built,—for the purpose of schools being so established. It would only again follow from this decision, that “establishing” is a flexible word; and upon that construction the Vice-Chancellor came to the conclusion, that it involved a direct and distinct proposition that schools should be built.

With reference to the question of inducement, it was argued in this way,—that the parties might go into the charitable or religious world, and say, “Here have we got certain funds for the endowment of ministers, and if you will build churches we will find you endowments;” and they might thus stipulate and enter into contracts with parties, which would bring the case within the principle of the *Attorney-General v. Davies*, where there was an express bequest in the will for a like purpose. The distinction I conceive is between an express direction in the will for that purpose, and a mere gift for the endowment by the trustees, which presupposes the existence and erection of the building, and which does not direct them to do anything towards the building.

If the principle with reference to the case of inducement be urged to the full length, I do not know where it is to stop. Suppose a bequest to trustees to provide for the sick poor of a parish in any manner that they may think fit, surely that would be a valid bequest,—and yet it may be a direct inducement to build a hospital; at all events it would give them the power, if they had the funds,

under certain circumstances to purchase the land and erect a hospital. So a bequest to trustees for the purpose of education in any manner which they might think fit, would allow the trustees to build schools; but there is no duty imposed on them to do so, although it would be competent to them to purchase land if the fund is in their hands. Now there seems to me to be a difference which is perfectly intelligible, between a bequest contained in the will pointing out any purpose of this description which is evasive of the statute, and a bequest to trustees which entitles them, not of necessity, but under certain circumstances, to do that which if it were directly contained in the will would be a clear evasion of the statute. It is clear, that if a testator said "I wish to provide for the sick poor of such a place, and if A. B. will build a hospital there, then I give him a sum of money to provide for the sick,"—that is a different thing from saying, "I give A. B. a sum of money for the purpose of endowing any place which is now or may hereafter be built." In the one case he directly points to an act which it would be unlawful for him to prescribe; and in the other case there is nothing necessarily unlawful, although it may be in the power of the parties the next day to enter into contracts which the law would not permit to be made a distinct subject of the trust. And so it would be if there were a bequest for the benefit of the poor generally,—for the inmates of almshouses, or for educating the poor as the trustees might think fit. In each case they might build a school, or almshouse, or hospital,—all of which would be illegal if directly pointed out by the will; but I do not think that is any ground for saying that such a bequest is to be considered invalid.

The case of *Trye v. The Corporation of Gloucester* is the only case that approximates to the present. All the others are clearly beyond it: all the other cases seem to me to amount to no more than this,—where the trust

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itself, if the statute were out of the way, would have been executed by the Court necessarily in a given mode, then, if that mode involves that which the statute forbids, the bequest is void. In *Trye v. The Corporation of Gloucester*, there is this additional circumstance,—that, although the property may be so given as to exclude the illegal application of the funds of the trust, yet inasmuch as it creates a direct inducement to do an act having a similar effect, it becomes an evasion of the statute.

I am then to consider, whether the case now before me in substance amounts to the same thing as the case before the Master of the Rolls. Now it appears to me, that in that case there was a clear and distinct direction that property should be acquired for the purpose of the charity. There was a fund to be held, not applicable to any other trust, impossible to be applied unless and until land was brought by somebody into mortmain. Here the application is to be for purposes perfectly legitimate,—an endowment of churches, of which there are plenty, which require aid in their endowment. There is a possible application of it, no doubt, to future churches; but if even the bequest is to be looked at with reference to its application to future churches, is that to be held to be such an inducement to bring land into mortmain as to be an evasion of the statute? That I think would be too strong. I have authority in the case before Sir *John Leach* of *Henshaw v. Atkinson* (a), which does not appear to me to be shaken by any subsequent authorities, unless it is in some degree impugned by the Master of the Rolls in the case of *Trye v. The Corporation of Gloucester*. In *Henshaw v. Atkinson*, the testator said, that, when and so soon as land should be given for the erection of a blue-coat school, then his money was to be applied for the purpose of maintaining it,—there were no negative words. Afterwards, there

(a) 3 Madd. 306.

came a codicil, in which he expressed that he was about to erect a school himself; and then he directed the application of the money. The Master of Rolls there said, that, whatever might be thought of the first codicil, it appeared the testator was not pointing to land to be brought into mortmain,—it was clear, when he made his second codicil, that he was about to erect a school himself; and the first direction pointed to land which would be already in mortmain, and the second shewed that that was the only land he pointed to; and the Master of the Rolls held, that that direction could be well sustained as a direction for the maintenance and support of a school; and, there being none to which it could be immediately applied, he directed a scheme for its application. That case is referred to in the case of *Attorney-General v. Hinzman* (a), and its authority is not questioned, and does not appear to be considered as open to any doubt or difficulty.

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The case before me is infinitely less strong than that of *Henshaw v. Atkinson*. It is a simple provision, that whereas this lady is desirous of having the Gospel preached in certain populous parishes, she wishes an endowment to be provided for the district churches. It would be impossible on that trust to direct—if the statute had never been heard of—the building of churches. None of the money could be applied to that purpose, and therefore no such trust is involved. It does not appear to me, knowing as we must all be taken to know, either judicially or otherwise, of the existence of numerous churches of this description to which this property is applicable, that I can possibly hold that this is an evasion or an intended evasion on the part of this testatrix of the restriction which the law imposed upon her; and therefore it appears to me, that the charitable trust may be well sustained, and the direction of the Court must be accordingly.

(a) 2 J. & W. 270.

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Apportion-
 ment of debts
 and legacies
 between the
 pure personal
 estate and the
 personal estate
 savouring of
 realty, not-
 withstanding
 the form of
 the bequest
 which disposed
 of the former
 and not
 of the latter.

A point was raised, whether the debts and legacies were to be apportioned, or whether they were to be thrown on this final residue? That question arose upon the mode in which the residue was given, "And as to the residue of my personal estate, which shall not be otherwise disposed of by me, I direct my said executors, as opportunity may offer, to apply such part or parts thereof as by law may be legally applied to" these particular purposes. And then she further says,—as to the other part of her residue which may not be "applicable by law to the purposes aforesaid, and not herein disposed of, I at present make no disposition." What, therefore, the testatrix has done is this,—she has directed her residuary estate, as it appears to me, to be divided into two portions, the one consisting of that part which savours of realty, and the other consisting of that part which does not savour of realty. She says, "Let the one go to the charitable bequest, and the other to persons whom I may name." In truth, she did not name them; and I assume it to be the same as if she had said, divide it into two parts; give the one to A. and the other to B., of that which was residue applicable to the payment of debts and legacies and the other charges given by the will. I think, therefore, there must be the usual direction for the apportionment.

May 7th.
 Decree.

THIS Court doth declare, that the sum of 209*l.* 6*s.* 2*d.* in &c., mentioned as the produce of the mortgage of the said testatrix upon the Ulverstone Canal Navigation, and also the sum of 5*l.* as the produce of her share in the Ulverstone Canal Warehouse, and the sum of 12,000*l.* in &c., due from Sir Harry Verney for the purchase of part of the testatrix's real estate in the county of Bucks (after making such deduction therefrom as hereinafter mentioned), and the sum of 1800*l.* in &c., due from Mr. Francis Smith for the purchase of other part of the testatrix's real estate in the county of Bucks, and the sum of 52*l.* 4*s.* in &c., the balance due from Samuel Higgs Gael, Esq., in respect of the purchase money of part of the testatrix's real estate at

Chariton Kings, in the county of Gloucester, are portions of the personal estate of the said testatrix which cannot by law be bequeathed for the charitable purposes in the said testatrix's will mentioned. And that upon the death of the said testatrix the same particulars became and are divisible amongst the Plaintiffs, and the Defendant Hannah Ross as the next of kin of the said testatrix, subject as hereinafter mentioned. And this Court doth declare that the rents of the said testatrix's real estate contracted to be sold to the said Sir Harry Verney, which accrued due between the time of her death and the 25th day of March, 1853, the time fixed for the completion of the said purchase, belong to the heir-at-law of the said testatrix. And this Court doth declare that the several other particulars in the Master's report of &c., enumerated and set forth as constituting the personal estate and effects of or to which the said testatrix was possessed or entitled at the time of her death, consisted of pure personalty. And this Court doth declare, that the said testatrix's residuary pure personalty was well bequeathed by her will to the Defendants John Hall, John Brown, and Edward Frampton, upon trust, for the charitable purposes in that behalf therein mentioned. And this Court doth declare, that the directions in the said testatrix's will to her executors to invest such a sum of money sterling as would purchase 2200*l.* Bank 3½ per Cent. Annuities was a legacy of sterling money within the meaning of the said testatrix's will. And that the same, and the other legacies of sterling money given by the said will, are thereby primarily charged upon her personal estate savouring of realty, which is liable to bear and pay the same in exoneration of her pure personalty. And this Court doth declare, that the debts and funeral and testamentary expenses of the said testatrix, and the costs of administering her estate, including the costs of this suit, (except so far as such costs relate to any proceedings to be had under the directions hereinafter given for regulating the charitable bequest, and except the costs of the said petitioners (a)), ought to be paid out of the said testatrix's personal estate savouring of realty and her pure personal estate pro rata; but that in ascertaining the amount in respect of which the personal estate savouring of realty is liable to contribute towards the payment of the debts and funeral expenses, the amount of the legacies of sterling money, and the legacy duty payable thereon, are to be deducted. And that, in ascertaining the amount in respect of which the pure personal estate is liable to con-

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A direction to invest so much money as will produce a certain amount of stock:—*Held* to be a pecuniary legacy.

(a) See *Edwards v. Hall*, 10 Hare, App. lxvi.

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tribute as aforesaid, the amount of the several charitable legacies of 3½ per Cent. Annuities, and also the pure personal estate specifically bequeathed, are to be deducted. [Directions for paying in balances, &c., and for paying legacies.—Order that the executors get in the unpaid purchase money of the real estates sold prior to the testatrix's decease, and the outstanding personal estate, and for investing and carrying over the monies to be paid into Court.] And it is ordered, that the said defendants be at liberty to receive the sum of 860*l.* 13*s.* 1*d.* cash, due from John Brogden and John Brogden the younger, esquires, in &c., mentioned as the produce of the testatrix's share and interest in the Ulverstone Canal Navigation. And there-out—It is ordered, that they, within one month after they shall receive the same, to be verified &c., pay 214*l.* 6*s.* 2*d.* (being the amount of two sums of 209*l.* 6*s.* 2*d.* and 5*l.* hereinbefore mentioned) into the Bank with the like privity to the credit of this cause, to the said account, intituled "The personal estate of the testatrix savouring of 'realty,' " and 646*l.* 6*s.* 11*d.*, the residue thereof, to the credit of this cause, to the said account, intituled "The produce of the testatrix's canal and other shares." [Directions for carrying over, and payment of certain legacies.] And it is ordered, that it be referred to the proper Taxing Master to tax the costs of all parties to this suit as between solicitor and client up to this time (except the costs of the said petition hereinbefore directed to be taxed). And it is ordered, that the amount thereof be paid in manner hereinafter directed out of any balance which may remain of the said sum &c., hereinbefore directed to be paid into the Bank to the credit of this cause by the said defendants John Hall, John Browne, and Edward Frampton, and of the proceeds of the residue of the said 30,577*l.* 19*s.* 2*d.* Bank Annuities hereinbefore directed to be sold, after making thereout respectively the several payments hereinbefore directed. And in case such balances shall not be sufficient to pay the said costs, then it is ordered, that so much &c.; and out of the money to arise from such sale and such balances of cash, it is ordered that the said costs be paid in manner &c. [Order for sale of so much stock as would be sufficient to raise any sum on account of the legacy duty remaining due on any part of the residue of the personal estate, to be verified, &c.] And it is ordered, that the money to arise from such sale or sales when so paid into the Bank, be paid to Mr. James Brotherton, the Receiver-General of Inland Revenue, without prejudice to any question as to the fund out of which such legacy duty should properly be paid. And it is ordered, that the relative values

and amounts of such parts of the testatrix's residuary personal estate as savour of realty, and such parts thereof as are pure personalty, (having regard to the declarations hereinbefore contained) be ascertained. And it is ordered, that the amount of the debts and funeral and testamentary expenses, and the costs of administering the estate of the said testatrix, including the costs of this suit, be apportioned between such parts of the said residuary personal estate as savour of realty, and such parts thereof as are pure personalty rateably, according to their respective amounts. And in making such apportionment regard is to be had to the declaration hereinbefore made as to deductions, and also to the mode in which legacy duty on the whole residue shall have been paid and ought properly to be borne. And having regard to such apportionment—It is ordered, that the particulars and amounts of such parts of the clear residuary personal estate as savoured of realty, and of such parts thereof as are pure personalty, be ascertained. And it is ordered, that it be ascertained what parts thereof respectively consisted of income, and what parts thereof respectively consisted of capital. And it is ordered, that a scheme for the application of the charitable fund given by the said testatrix's will in the endowment of district churches or chapels in populous parishes be settled and approved of, having regard to the direction in the said will in that behalf contained.

[Continue account.—Reserve further consideration.—Liberty to apply].

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The particulars of sale (erroneously, but without any fraud) described a part of the property as customary leasehold, holden of a certain manor, and renewable every twenty-one years at a customary fine, and an annual rent of 10s. This property proved to be holden only for the residue of a lease for twenty-one years, at a rent of 10s., without any customary right of renewal. One of the conditions of sale fixed the time at which any objections to the title of the vendor

A CLAIM by a purchaser against a vendor, for specific performance of a contract, with a compensation out of the purchase money for the difference in value between the tenure upon which a portion of the land was described as being held, and the tenure upon which it was actually proved to be held.

The property in question was sold by auction at the Mart, and was, in the particulars of sale, described as containing about four acres, of which about three acres were freehold, and the rest, consisting of the house, garden, lawn, and paddock, containing about one acre, were "customary leasehold, held of the lord of the manor of Barking, and renewable every twenty-one years, on payment of the customary fine, at an annual rent of 10s." The existing lease was accurately described in the particulars as being for a term of twenty-one years from Michaelmas, 1842, and as containing the usual covenants, on the part of the lessee, to pay the rent of 10s. a year and all taxes, to repair, not to assign without the consent of the lessor, and that all deeds and writings concerning the demised premises should be prepared by the steward of the manor.

should be taken, and enabled him, at any time after the delivery of such objections, to vacate the sale. Another condition provided, that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to the leasehold property; and a further condition stipulated, that if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in the particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser should allow or pay compensation. Upon a bill by the purchaser against the vendor—*Held*, that the purchaser was entitled to specific performance of the contract, with compensation for the absence of any customary right of renewal, the same being a misstatement or misdescription within the last-mentioned condition.

That the power reserved to the vendor of vacating the sale, must be construed to apply only to a case of dispute, arising upon an objection of title.

That the claim of the purchaser for compensation, in respect of the absence of any customary right to renew the lease, was not an objection to the title, within the meaning of the particulars and conditions of sale.

It appeared by the evidence, that the lessee of the lease of 1842 and the present vendor, at the time he became the assignee of the property in 1844, and at the time of the sale in 1852, believed that there was such a custom as was stated in the particulars, and that the steward of the manor had, until the inquiries for evidence were made in this case, been under the same belief; but it turned out that there was in fact no such custom to renew; that it was optional with the lord to do so or not, and that the existing lease contained a covenant by the lessee to deliver up possession at the end of the term. The only material conditions of sale were the 4th, 5th, and 6th conditions.

4th. The vendor shall, within fourteen days after the sale, deliver an abstract of the title to the purchaser, or his or her solicitor, such abstract, as regards the freehold portion of the property, to commence with a mortgage, dated 5th day of April, 1827, to a former proprietor, who subsequently purchased the equity of redemption; and the purchaser shall not require any earlier or other title to such freehold portion. And the purchaser shall, within fourteen days from the delivery of the abstract, deliver to the vendor's solicitors a statement in writing specifying his objections (if any) to the title, and in default thereof the title shall be considered as approved of and accepted by the purchaser; and the vendor shall be at liberty, if he thinks fit, by notice in writing at any time after the delivery of such statement of objections, to vacate the sale, and on the sale being so vacated the deposit is to be returned without interest, costs, or other compensation.

5th. The purchaser shall not require the production of the title of the lessor, or lord of the manor, to demise the customary leasehold portion of the property sold, but shall accept the existing lease granted in 1842, and the assignment thereof to the vendor, as a sufficient title to such customary leasehold property.

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6th. If, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in this particular, such error or misstatement shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value according to the average of the whole purchase money as a compensation either way.

Argument.
 —

Mr. Daniel and Mr. Rudall, for the Plaintiff, the purchaser, cited *Milligan v. Cooke*(a), *Thomas v. Der- ing*(b), and *Graham v. Oliver*(c); and insisted that the representation in the particulars of the property, that the leasehold was renewable by custom, was a misstatement; and that, under the 6th condition, as well as by the general rule of the Court, the purchaser was entitled to compensation; and he therefore claimed the completion of the contract, with an abatement. They contended that it was not a question of title, as the vendor's title to the lease was not disputed.

Mr. Rolt and Mr. Wickens for the Defendant, the vendor, contended that the non-existence of the covenant to renew was a defect of title, which enabled him to vacate the sale and return the deposit under the 4th condition. It was not a case for compensation, even if it had come within the clause as to misstatements; for it was impossible to fix the amount of compensation. It was impossible to predicate how far the lord of the manor might consider himself bound by the supposed custom under which his predecessors and the lessees had acted. The vendor was perfectly blameless in regard to the description, for he acted on a belief which he had formed from what the steward of the manor had told him; and therefore it was a case in which the Court in its discretion would not enforce a spe-

(a) 16 Ves. 1.

(b) 1 Keen, 729.

(c) 3 Beav. 124.

cific performance, the effect of which would be to sacrifice the property. The Court would leave the parties to their legal remedies.

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Argument.

VICE-CHANCELLOR:—

The questions in this case arise upon the particulars and conditions of sale: and the first question is, whether or not the vendor is entitled to say he can rescind the contract on returning the deposit money, it being admitted that this is not a case in which there is any misconduct on the part of the vendor, except that it may be said that he has been negligent in not fully informing himself of the nature of his interest. He was, there is no doubt, acting innocently, on the impression that his interest was that which he represented it to be. The second question is, whether the purchaser can, under the special circumstances of the case, insist on a specific performance of the contract, with compensation for the difference in the value of the interest of the vendor.

Judgment.

The 4th condition of sale provides for the delivery of the abstract of title within fourteen days, and for the delivery by the purchaser of his objections to the title within a like period: and it then provides, that the vendor shall be at liberty, if he thinks fit, by notice in writing at any time after the delivery of such statements of objections, to vacate the sale; and, on the sale being so vacated, the deposit is to be returned without interest, costs, or other compensation. Upon this clause I may observe, that the liberty given to the vendor to vacate the sale cannot be construed as a general power of rescinding the contract, but must be taken to refer to the case of objections with regard to title with which this provision is connected. The provisions in the 5th clause, that the lease and assignment are to be taken and accepted as evidence of title to the customary leasehold property, are not without some bearing on the question; and there is then the 6th condition, that any error,

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misdescription, or misstatement shall not vitiate the sale, but that the parties shall pay or allow a compensation. With reference to the effect of this condition, it is said that the vendor, having made such a description of the property by mistake, it is a great hardship upon him, not capable of estimation, that he should be compelled to give up his tenure, which, although it does not confer an absolute right of renewal, yet affords at least a facility for procuring a renewal of the lease. It is said, that the Court would be thereby handing over to another party the benefit of the custom or habit of the lord, which might afford the assignee almost all the advantage which the actual right would give; and that it would be therefore inequitable to allow the purchaser to insist on the performance of the contract with full compensation, when he had at the same time the indefinite benefit of obtaining from the lord the renewal in such a way as to give him the whole interest he contracted for. It does not appear to me, however, that I could, on that ground, refuse to enforce the specific performance of the contract. It is true, that there are some cases of innocent mistake, in which it has been said that the purchaser cannot insist upon specific performance with compensation, and that he must take the whole as it is, or allow the contract to be vacated. But, in this case, the 6th condition of sale seems to have been framed to meet that difficulty, and to prevent these cases from applying in the present instance. The construction of that condition must be the same as that of the similar condition in the case of *Leslie v. Thompson* (a), in which the Vice-Chancellor *Turner* thought that the mistake or error meant to be referred to was such as would vitiate or annul the contract for sale. In that case the vendor, from having relied on old documents in preparing the particulars, had inaccurately described the property, without any intention to defraud. That case does not touch the question as to hardship. With regard to that point, if this had been a church lease, and it had been re-

(a) 9 Hare, 268.

presented that there was a perpetual right, the case might have presented more difficulty. The argument as to the effect of the ordinary practice as to renewals would have had more force, (I do not say whether it would have succeeded); for in that case there is more than the mere habit of renewal. It does not depend altogether on individual will. The lessors have only life interests, and by refusing to renew, they would risk the loss of all the benefit they might derive from the property. It is, therefore, in such cases the continual practice to renew the leases, and the interest of the lessee under a church lease has had some sort of recognition by the Legislature. A recent Act provides, that regard shall be had to that particular interest by the Ecclesiastical Commissioners. But this is an entirely different case. There is nothing to induce the lord to give up the benefit of obtaining the full rent on the expiration of the lease. If he did not do so it would be a mere bounty to the lessee. The steward seems hitherto to have been under the same mistake as other parties, for he had given a certificate of the custom; but he is now aware of it, and has discovered that there is no such custom. It is, therefore, too much to say that the Plaintiff, and those claiming under him, will be likely to procure a renewal on the same terms as heretofore; and that not only the present lord, but all other parties who may acquire the manor, with the view of course of making the most of it, will have respect to this habit of renewal which had arisen by mistake. I do not think, that, in the circumstances of this case, I can give the Defendant any benefit of that speculation, or conclude that it will be harsh or inequitable to give the purchaser compensation in respect of the mistake. I think that it is one of the cases, for which the 6th condition of sale must be taken to provide.

One point remains to be considered,—whether, under the 4th condition of sale, the vendor was not at liberty to vacate the contract. Upon this question, I certainly felt

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some difficulty. A formal notice had not been given, but as that might be done during the argument, in order that the question might be fairly raised, the counsel for the Plaintiff very properly waived any objection on that ground, except in so far as it might affect the costs. The 4th condition relates to the title of the vendor to the thing which he describes. The vendor proposes to sell a perpetual interest, which turns out to be an interest for twenty-one years only. It is difficult to say that this is not in one sense a question of title; but looking at the whole of these conditions of sale, I think that they must be taken to mean this:—"I (the vendor) have described my property as being of a particular character and a particular tenure. It may be, that what I have described is perpetually renewable, but the title may be in some other person, and not in me." The title in that sense must mean the title to the thing described. In this point of view the 5th condition is important. The existing lease is to be taken as sufficient evidence of the title; but it cannot be contended that the lease is any evidence that it is perpetually renewable; the lease is, nevertheless, to be evidence of the title of the lessee to the property he has described and offered for sale. I think that it is to the title in this sense that the 4th condition applies, and that it means, that, if the purchaser makes such objections to the title of the vendor to the leasehold estate which he cannot remove, then he shall be at liberty to vacate the contract.

There must be a decree for specific performance, with an inquiry what compensation should be allowed to the purchaser for the difference in value as regards the house, garden, &c., between a leasehold interest renewable every twenty-one years, on the payment of the customary fine (calculated on the same principle as the fine paid on the last renewal), and at an annual rent of 10s., and the value of the interest in the same property which the vendor is capable of conveying to the purchaser.

1853.

POOLE v. BOTT.

April 14th.

MICHAEL BOTT, by his will, dated the 21st of December, 1844, gave and devised unto his four sons, *John*, *Thomas*, *Charles*, and *Philip*, their respective heirs and executors, all his freehold, copyhold, and leasehold estates, in equal shares, as tenants in common, and to become vested in his said sons at the times following, viz. one moiety or half part of his said estates respectively when and as his said sons respectively should attain the age of twenty-one years, and the remaining moiety or half part thereof when and so soon as his youngest son for the time being should attain the age of twenty-one years; but, in case any one or more of his said sons should die before the respective moieties of and in his or their share or shares of and in his said estates should become vested as last aforesaid, the said testator gave and devised such unvested shares of and in the said messuages or tenements, farms, lands, and hereditaments, which should belong to his son

A devise of real estate to the four sons of the testator as tenants in common, and a bequest of residuary personal estate, in trust for the same four sons, in like manner, to be vested in them as to one moiety as they should respectively attain twenty-one years of age, and as to the other moiety when the youngest should attain that age, and in case any son should die before the respective

moieties of his share should become vested, then the unvested share which should belong to the son so dying, and also his accrued share, to go to the others of the testator's sons as tenants in common, and to become vested at the times aforesaid; and in case all his sons should die under twenty-one, then to the testator's right heirs; and the testator appointed his executors guardians of his sons, and empowered such guardians to receive the rents and profits of the respective shares of his sons in the said real estate during their minorities, for their maintenance, education, and advancement:—*Held*, that the sons took an immediate and vested interest in their respective shares in the real and personal estate, but liable to be divested by their death before the time at which the testator declared they should respectively be vested, payable, or transferable.

The will contained a proviso, that in case any one of the testator's sons should marry or illegally cohabit with certain of their cousins, then and in every such case, as well the original as every accruing share or shares of the said son or sons so intermarrying or illegally cohabiting as aforesaid, should go over and be in trust for all and every the person or persons, who, under the trusts and directions of the will, would have been entitled thereto, in case the son or sons so intermarrying or illegally cohabiting as aforesaid had died under the age of twenty-one years; and he declared, that it should not be lawful for his trustees to pay to his sons the amount thereby bequeathed, or to permit them to enter upon the possession of the lands thereby devised, until they should have respectively given and executed to his trustees a bond in the penal sum of 20,000*l.* that they respectively would not intermarry or illegally cohabit with their said cousins.

Held, that the direction with regard to the bonds would not be enforced by the Court; and the trustees were directed to transfer the residuary shares of the sons, without requiring them to enter into such bonds.

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or sons respectively so dying as aforesaid, and also the share or several shares of and in the said hereditaments which the same son or sons respectively should take under that provision, unto and to the use of the other or others of his said sons, share and share alike, as tenants in common, and to become vested at such ages, days, or times as his or their original share or shares, and his or their respective heirs, executors, administrators, and assigns; and in case all his said sons should die under the age of twenty-one years, then the said testator gave and devised the same messuages or tenements, farms, lands, and hereditaments, unto his own right heirs for ever.

The testator then gave to *Poole* and two others all other his goods, chattels, and personal estate, upon trust to convert into money such parts as did not consist of money or Government securities, and to stand possessed of the residue, after payment of his debts and funeral and testamentary expenses, upon trust for his four sons, *John, Thomas, Charles, and Philip*, in equal shares, one moiety or half part of such shares to become vested in and payable and transferable to them respectively when and as they should respectively attain the age of twenty-one years, and the remaining moiety or half part thereof to become vested in and payable and transferable to them when and so soon as his youngest son for the time being should attain the age of twenty-one years, provided, and he did thereby declare his will to be, that if any one or more of his said sons should die before the respective moieties of his or their share or shares should become vested, payable, and transferable as last aforesaid, then and in such case the unvested share or shares of him or them so dying, should go and accrue to the survivors or survivor, or others or other of his said sons, and be equally divided amongst them if more than one, share and share alike; and the same should become vested, and payable or transferable, at such ages,

days, and times, as his or their original portion or portions were thereby directed to become vested and payable, or transferable, as aforesaid; and, in case of the death of any other of his said sons before such accruing or surviving share or shares should become vested as aforesaid, then every such accruing or surviving share should again be subject and liable to such right, chance, contingency, or condition, or accruer to and amongst the survivors or survivor and others or other of his said sons, as thereinbefore is provided concerning the said original portion or portions, or share or shares.

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Then followed provisions for the maintenance of the sons during their minorities, and a limitation of the residuary personal estate in case all his said sons should die under twenty-one years of age, upon trust for such person or persons as, at or immediately upon the decease of all his said sons without issue as aforesaid, would be entitled to his (the testator's) personal estate under the statute of distributions, in case he had died intestate immediately after such failure of issue.

Then followed a provision, that, in case any of his said sons should intermarry or illegally cohabit with any of their cousins, the daughters of —, of —, then, and in any such case, as well the original as every accruing share of the son or sons so intermarrying or illegally cohabiting as aforesaid, should go over and be in trust for all and every the person or persons who, under the trusts of his will, would have been entitled thereto in case the son or sons so intermarrying or illegally cohabiting as aforesaid had died under the age of twenty-one years. Provided also, and he did thereby direct and declare, that it should not be lawful for his trustees to pay to his said sons the amount given or bequeathed to them respectively by his will, or to permit them to enter upon the real estate thereby devised

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to them respectively, or any part of the same real and personal estate, until they should respectively have given and executed to his said trustees for the time being a bond in the sum of 20,000*l.*, that they respectively would not intermarry or illegally cohabit with any of the daughters of the said —, of —. And the testator appointed *Poole* and the two others executors of his will, and he also appointed them guardians of the persons and estates of his sons during their respective minorities, and empowered the said guardians to receive the rents and profits of the respective shares of his said sons respectively in his real estates during their respective minorities, and to apply all or any parts of the said rents of the same shares to their respective maintenance, education, and advancement.

The testator died on the 29th of December, 1846.

John, the eldest son, died on the 7th of January, 1849. The other sons were still infants at the time of the institution of the suit, but two of them came of age during its progress.

Argument.

Mr. C. Hall, for the Plaintiff, the sole acting trustee and executor.

Mr. Shapter, for the persons who, if the trusts of the will—for such person or persons as at or immediately upon the decease of all the testator's four sons without issue would, by virtue of the Statute of Distributions, be entitled to his personal estate, in case he had died intestate immediately after such failure of issue,—had in fact come into operation immediately before the filing of the bill, would have become entitled under such trusts.

Mr. Follett and *Mr. E. F. Smith* for *Thomas Bott*, the eldest surviving son and heir at law of the testator and of *John Bott*, the deceased son.

Mr. C. Barber for *Charles Bott* and *Philip Bott*, the two surviving younger sons.

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Upon the point whether the interest of the sons of the testator in the real and personal estate was vested or contingent, having regard to the words of the will, which specified certain ages and events—namely, the attainment of their ages of twenty-one, and the attainment of that age by the youngest son, as the time at which it should vest—and described the shares before that time and event as “unvested,” the cases of *Taylor v. Frobisher* (a) and *Berkeley v. Swinburne* (b) were cited.

The VICE-CHANCELLOR held, that, looking at the whole will, and notwithstanding the testator spoke of the shares as unvested, and of the time at which they should vest, there was an immediate devise and gift of the several shares of the real and personal estate to the sons, liable, however, to be divested in the events referred to in the will. There was no doubt, that, in a legal sense, the word “vested” meant that the legatees were not to take any interest until the time appointed by the will; and, if the case rested there, the point might be questionable; but, upon going on further, the testator directed clearly enough what was to be done with the two moieties. First, as to one moiety, the shares were to vest in the sons at twenty-one; and, as to the other moiety, the shares were to vest and become payable when the youngest son should attain twenty-one; and, if any die under twenty-one, the testator gave the share which should *belong* to the son or sons so dying to the others of them. It might not have been entirely satisfactory if there had been nothing more in the case; but there

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(a) 5 De G. & S. 191.

(b) 16 Sim. 275.

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was afterwards the guardianship clause, in which the testator, after appointing his executors the guardians of the persons and *estates* of his sons during their respective minorities (the estates there referred to being the estates in question), empowered the said guardians to receive the rents and profits of the respective *shares of his said sons* in his real estates *during their minorities*. The testator had not, as in the case of the personal estate, interposed trustees; but he had made an immediate gift of the real estate to his sons, and then he added a power to the guardians to receive the rents of their shares. According to the construction which had been contended for, if a son died under twenty-one, the other sons would have had no means of acquiring any benefit from the share of the child so dying; because, under this clause, it was only during the minority of the children that the guardians had the power to receive and apply the rents, and upon their death the guardianship would have ceased. The word "vest," as well any other word, might receive a modified interpretation where the context required it. In determining this case, it was satisfactory to find that there were two cases in which such a qualified construction of the word had been adopted.

Upon the question, whether the sons were bound to give, or the trustees bound to require the bonds to be given under the above proviso, *Da Costa v. Jones* (a) and *Gilber v. Sykes* (b) were cited.

VICE-CHANCELLOR:—

It is very possible, that the only result of requiring the bond mentioned in the will would be the discovery that it

(a) 2 Cowp. 729.

(b) 16 East, 150.

was wholly ineffectual. Unless all the sons die under the age of twenty-one, the next of kin are not to take. This condition, however, is, that if any of the sons marry or illegally cohabit with his cousin, his share is to go over as if he had died under twenty-one.

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It is possible that every one of the sons might do what the testator by this clause indicates his desire that they should not do; and the death of all the sons under twenty-one not having in fact taken place, there may be a doubt whether the forfeiture under the second provision has not the effect of carrying the share back to the sons under the former limitation. The will does not contain a gift over accurately coinciding with the condition as to the forfeiture.

Even, however, if it were clear that there would be some person interested in enforcing the bond, I think I ought not to direct such a bond to be entered into.

Any action brought upon such a bond, if it could be sustained, would be attended with judicial inquiries, which could hardly fail to disturb the peace of another family; that family being at the same time one which does not take any interest or benefit under the will of this testator. I am of opinion that this Court should not, under these circumstances, require an instrument to be executed which might be followed with such consequences. I shall, therefore, direct the transfer of the shares of the sons to be made to them without regard to this direction.

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May 31st.

BIRD v. FOX.

A direction by a testator that his trustees shall stand seised and possessed of his real and personal estate upon trust to raise and pay an annuity, and subject thereto to raise out of his real and personal estate a sufficient sum to make up, with what his daughter *A.* had received on her marriage, an amount equal to the property his other children would be entitled to under his will; and a devise of all his real estate and the residue of his personal estate to his other six children, as tenants in common, and until a sale of all his real and personal estate should be made; and in order that no such sale should be required, to ascertain the amount of the share of his daughter *A.*, he authorised his trustees, if they should think fit, to cause a valuation to be made of his real and personal estate, and according to its amount, after deducting debts &c., to fix the share of his daughter *A.*, which should be accepted by her; with a further direction, that she should not be entitled to any interest on her share, until each of his other children had received interest on a sum equal to the amount previously advanced to her; and that no valuation should be required to be made until each of the other children had received such equal sum; and a clause declaring that the receipts of the trustees shall be sufficient *discharges* for any money payable to them under his will, and that the person paying it shall not be liable to ascertain the necessity or regularity of any mortgage, sale, or disposition under the trusts of the will:—*Held*, that the trustees had a power of sale of the whole real estate of the testator, which it was at their discretion to exercise in case they did not think fit to proceed by way of valuation.

(a) This was revoked by a codicil, and the interest given to the wife for her separate use.

provisions aforesaid, I give and devise all my real estate, and residue of my personal estate, unto my sons *John Bird* and *Charles Bird*, and my daughters *Eliza Bird*, *Mary Bird*, *Harriet Bird*, and *Louisa Bird*, their respective heirs and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants, and until a sale of my real or personal estate shall be made; and in order that no such sale shall be required to ascertain the amount of the share which my daughter *Ann* will be entitled to under this my will, I authorise my said son *John Bird*, and my said daughters *Eliza Bird* and *Harriet Bird*, if they shall think fit, to cause a valuation to be made of my real and personal estate; and that, according to the amount of such valuation, after deducting debts, funeral and testamentary expenses, the share which my daughter *Ann* or the said *George Cox* will be entitled to under this my will shall be fixed upon by my said son *John Bird*, and daughters *Eliza* and *Harriet Bird*, and the amount thereof shall be accepted and taken by her or the said *George Cox* accordingly; and I further direct, that my daughter *Ann* or the said *George Cox* shall not be entitled to receive any interest or any sum of money under this my will until each of my other children shall have received 500*l.*, and shall not be entitled to the receipt of any interest on her share (if any) until such sum of money as will be equal to the interest of 500*l.* at 5*l.* per cent. shall be received by each of my other children: And I also direct that no valuation shall be required to be made as aforesaid, whether such sale shall have taken place or not, until the said sum of 500*l.*, or such interest, shall be received by each of my said children (except *Ann*): And I expressly declare, that the receipt or receipts of my said son *John Bird*, and my daughters *Eliza Bird* and *Harriet Bird*, and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, for any money payable to them or him under this my will, shall effectually discharge the person or

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persons to whom the same shall be respectively given from being obliged to see to the application, or from being answerable for the misapplication or nonapplication of the money therein respectively mentioned to be received, and from being bound to ascertain the necessity or regularity of any mortgage, sale, or disposition which may be made by my said son *John Bird*, and my said daughters *Eliza Bird* and *Harriet Bird*, and the survivors and survivor of them, under the trusts of this my will."

The testator died in 1834, and his widow, the annuitant, in 1844.

In the year 1852, the Plaintiffs, *John, Eliza, and Harriet*, as trustees under the will, contracted with the Defendant, *Charles Fox*, for the sale to him of a freehold estate near *Wellington*, in *Somerset*, being part of the real estate of the testator. By this contract, the vendors agreed, that, on payment of the purchase-money, they would execute to the said *Charles Fox* a proper conveyance of the said premises in fee simple, adding that, as they were trustees with a power of sale, they would covenant merely that they had done no act to incumber; and the parties beneficially interested should not be required to join in such conveyance.

Ann Cox was dead before the date of the contract, having by her will appointed an executor, by whom her will was proved.

The Defendant was advised, that the Plaintiffs had only a power of sale extending to such a portion of the estate as would be sufficient to satisfy the share of *Ann Cox*. In this view of the case, it was stated that he was supported by the opinion of a late eminent conveyancer (a), before

(a) Mr. Brodie.

whom the case had been laid. It appeared upon the affidavits, that there had been a previous sale of a portion of the testator's estate, from which about 400*l.* had been produced,—a fact which had come to the knowledge of the purchaser. The purchaser's solicitor had asked for an account of the personal estate, and of the debts, but which the vendors had declined to give.

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Mr. *Rolt* and Mr. *Morris*, for the Plaintiffs, insisted that, upon the will, the Plaintiffs had a clear power of sale, and were competent to make a good title.

Argument.

Mr. *W. M. James* and Mr. *Cairns*, for the purchaser, contended, that it was the duty of the Plaintiffs, in the execution of their trust, to ascertain the value or amount of the share of the daughter, *Ann Cox*, in the manner pointed out by the will, and not by a sale; and having ascertained the amount of that share, it was then their duty to satisfy it by an application of any portion of the estate not required for debts or legacies. It would be a breach of trust to sell the entire estate, of which the purchaser would clearly have notice. Under such circumstances, it was at least incumbent on the vendors to shew that the sale, which they attempted to effect, was inevitable, especially as it appeared that, independent of the estate comprised in the contract, a sum of money had been raised which might have been sufficient to answer the share of the married daughter. In *Forbes v. Peacock* (a), Lord *Lyndhurst* says, "If, indeed, he (the purchaser) had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible" (b).

(a) 1 Ph. 317.

(b) Id. 721.

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VICE-CHANCELLOR:—

Upon the construction of the will, having the most unfeigned respect for the gentleman who appears to have taken a contrary view, but who also seems to have had other circumstances present to his mind that may, in some measure, have influenced and biassed his opinion, I cannot have any doubt that there is an option given by this will to the trustees to take one of two courses, in order to raise, as it is here expressed, “such a sum of money as, with the sum already advanced to his daughter *Ann*, would together be equal in value to the property which his other children would be entitled to under his will;” and they might, for that purpose, either have sold the whole estate, or caused a valuation to be made of the real and personal estate, and, according to the amount of that valuation, after deducting debts, funeral and testamentary expenses, have ascertained and fixed the share of *Ann Cox*.

The reason which leads me to conclude that there is a clear option, if the trustees think fit, to sell the whole estate, is this: that, although the first words might have raised some doubt if they stood alone,—for in these words, after stating that the testator had advanced his daughter *Ann Cox* 500*l.* on her marriage, he declares the trust to be, out of the real and personal estate, to raise such a sum of money as, with the sum advanced to his said daughter, would together be equal in value to the property which his other children should take,—yet, a little further on, he proceeds to give and devise all his real estate, and the residue of his personal estate, unto his sons *John* and *Charles*, and his daughters *Eliza*, *Mary*, *Harriet*, and *Louisa*, their respective heirs and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants, and *until* a sale of his real or personal estate shall be made. Taking the whole of these expressions together, I think it must be inferred, that the testator contemplated a sale of his real

and personal estate. He expresses himself as unable to refer to a sufficient portion to make up that valuation, but he contemplates the sale of the whole of his real and personal estate as the best mode of ascertaining the value; and, in truth, unless he had given some such subsequent power as is afterwards contained in the will, of binding his daughter *Ann Cox* with reference to the value, I do not see how the trustees could, upon their own responsibility, take any other course than sell the whole estate, in order to arrive at the proper value of her share. I think the existence of the option is still more clear upon the subsequent clause; for the testator says, "In order that no such sale shall be required, to ascertain the amount of the share which my daughter *Ann* will be entitled to under this my will, I authorise my son and said daughters," (the trustees,) "if they shall think fit, to cause a valuation to be made of my real and personal estate." What sale is it that the testator wishes by this provision to avoid the necessity of? A sale of the entirety; for, after they had made a valuation of the whole estate, it may still be necessary that there should be a sale of a part to raise money enough to provide for the share of *Mrs. Cox*. The valuation, therefore, would not avoid a sale of a sufficient part for that purpose. The testator says, 'I wish to give a power to the trustees, if they think fit, to avoid a sale of the entirety, and to resort to valuation.' The subsequent clause makes it clear beyond all doubt that there was a power of selling the whole estate, for the testator directs that his daughter *Ann* and her husband shall not be entitled to receive interest until each of his other children shall have received 500*l*. This sum is to be received in cash. He must, therefore, have contemplated a sale of the whole property, and its distribution in shares, with an appropriation of those shares in sums of 500*l*. to each of the children, amounting to 3000*l*., before any distribution should be made to *Ann Cox*. It appears to me, therefore, that two courses were originally pointed

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out by the will, either of which the trustees might pursue.

The difficulty which is suggested arises upon this option which is given to the trustees, and upon the expressions of the testator, by which he not only seems to give an option, but rather to indicate something of a preference for another mode instead of an actual and complete sale. He says, "in order that no such sale shall be required"—that is, "I do not make such a sale absolutely necessary; and I give power to my trustees, if they think fit, to cause a valuation to be made, which to a certain extent may answer the purposes of a sale." I think that, if the trustees have actually caused such a valuation to be made, and that is done in such a manner as to bind *Ann Cox*, as to which at present there is no information, then the estimate having been once made, and the parties bound by it, the will may be read as if the estimated sum had been inserted in it. Assuming, for example, the share of *Mrs. Cox* to be 900*l.*, I read the will as if the testator had said, "I direct my trustees to sell a part of my property, sufficient, together with 500*l.*, to make 900*l.*" There might still, I think, be a question as to how far that power was to be exercised.

It appears that a sale of property of the testator had been previously effected, by which 400*l.* was raised, and that sum added to 500*l.* makes 900*l.*, which, without entering into any minute calculation, it is sufficiently apparent is an approximation, as far as the information now before the Court goes, to the amount of this lady's share, that share having to be ascertained after deducting the debts and funeral and testamentary expenses of the estate. The debts may have exceeded the margin, and thus reduced her share; and, on the other hand, there may have been personal estate, which, together with the sum actually raised

by the previous sale, may have been enough to clear off this share; and, in that state of circumstances, it appears to me that the purchaser is entitled to have, and the Court may now afford the vendors time to give him, such information as will shew that the option of resorting to a valuation instead of a sale has not been exercised. If the case had been an ordinary one of claim for specific performance before the new practice was introduced, it would have been of course to direct a reference as to title if required; and the Court will now direct the case to stand over, to afford the parties an opportunity of supplying this information. I suppose that in this case all points of title are settled, except that which has been argued; and I think the purchaser is entitled to a declaration from the trustees (if the fact be so), that they have not exercised the alternative option which the will gives them. The trustees have already sworn that the money was not sufficient to raise the value of the share: and the purchaser having been informed of that fact, according to *Jones v. Smith* (a), he is perfectly protected by that statement. But I think the purchaser is entitled also to have, not a declaration, but (as the matter is now before this Court) an affidavit, stating whether they have or have not adopted the alternative course pointed out by the testator,—whether they have or have not, following the words of the will, “caused a valuation to be made of the testator’s real and personal estate, in order to ascertain the amount of the share which his daughter *Ann Cox* would be entitled to under his will.” It appears to me, that, if the affidavit be in the negative, it is clear that the original power of selling the estate and paying their shares to the different parties, as well as to *Ann Cox*, remained; and that the receipts of the trustees will be a sufficient discharge.

A question was raised upon the evidence of identity, under the construction of one of the conditions of sale, which

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(a) 1 Hare, 43.

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provided, that "where on account of any part of the property, having been conveyed under a general description, or hedges having been removed, or otherwise, evidence of seisin or identity, or of the boundaries of any of the closes, is not afforded on the face of the deeds, a statutory declaration of the possession or receipt of the rents for thirty years and upwards according to the title declared, or of the identity of the premises, shall be deemed sufficient evidence of seisin or identity."

Upon this point the VICE-CHANCELLOR held, that the purchaser was entitled to an affidavit, to the effect that the particulars afforded by the declaration as to the identity of the premises was the best evidence on that subject which the vendors were able to give.

An affidavit was put in negating the fact of any valuation having been made according to the option given by the will. An affidavit was also made on the point as to identity.

The cause was then heard upon the question of costs. On the part of the Plaintiffs it was contended, that they should be paid the entire costs of the proceedings, inasmuch as the objection to the title of the vendors upon the construction of the power of sale had not been sustained. The affidavits which the vendors had put in were made in the suit, only because the vendors had been driven to institute a suit. The affidavit as to the absence of any valuation was in fact proved to be unnecessary; it could only have been necessary on the supposition that the vendors were wrong in their proceeding, but which the affidavit itself negated.

On the part of the Defendant it was contended, that it was not a case for costs, having regard to the nature of the objection, and especially to the fact that it was not entirely

removed until after the affidavit was put in, to which the Court held that the Defendant was entitled: *Wilson v. Allen (a)*.

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The VICE-CHANCELLOR made the decree for specific performance with costs, excepting the costs of the affidavits as to the valuation and identity, observing that he had required the former affidavit, not because he was of opinion that the Plaintiffs could not make a good title without it, but because he thought the purchaser was entitled to it, for the purpose of displacing any inference that might arise from the facts in evidence with regard to the property of the testator, which had been previously realised by the trustees.

(a) 1 J. & W. 623.

BROWN v. SEWELL

April 18th.

THE Defendant having become liable for the repayment of money which had been advanced to the Plaintiff, the Plaintiff made to the Defendant a mortgage of an estate by way of indemnity. The liability having afterwards ceased and the indemnity being therefore no longer required, the Defendant reconveyed the estate to the Plaintiff, but did not redeliver the title deeds; and the bill prayed that the Defendant might be ordered to deliver them up to the Plaintiff, or to indemnify him against the consequences of any loss of the deeds which might be found to have occurred.

On a bill by a mortgagor, whose estate had been discharged from the mortgage, and who had taken a reconveyance, against the mortgagee, for the delivery up of the title deeds, or for an indemnity, it was found that the deeds were lost by the mortgagee or his agent.

The Court thereupon refusing to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it, from the absence of the deeds, yet *held*, that the mortgagor was, upon the authorities, entitled to relief in respect of the additional expense of producing evidence of his title, and directed a reference (as in *Hornby v. Matcham*, 16 Sim. 327), to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds.

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At the hearing of the cause it was referred to the Master to inquire and state to the Court what deeds and documents relating to the title of the manor or lordship, hereditaments, and premises in the pleadings mentioned were delivered over to or came into the possession of the Defendant *D. Sewell*; and whether any or either and which of the deeds and documents relating to the title of the said manor or lordships, hereditaments, and premises, had ever been and when lost whilst in the possession or custody of the said Defendant *D. Sewell*, or of any person or persons claiming under him; and if the same were not forthcoming what had become thereof respectively; and if the same were forthcoming, where and in whose possession or power the same or any and which of them then were or was; and if the Master should find that such deeds and documents, or any or either of them, had been lost, then he was to ascertain and state in whose possession or custody such deeds and documents were at the time or times when the same were so lost, and by whom and under what circumstances such deeds and documents, or any or either and which of them, had been lost; and what written or other evidence existed of the contents, purport, or effect of such lost deeds or documents, or any or either and which of them, or of any memoranda or memorandum written or indorsed thereon respectively.

The Master found that all the deeds and documents relating to the title to the said premises were delivered over to the said Defendant; that the same were either lost between the month of February, 1836, and the month of April, 1849, whilst in the possession or custody of the Defendant, or had been lost since the month of April, 1849, whilst in the possession or custody of Mr. *J. G. Shepherd* in *Halstead*, in the county of *Essex*, gentleman, to whom the Defendant delivered them; and that an abstract of the title to the said premises, with certain memoranda shewing that the same had been compared with the said deeds and docu-

ments and found to be correct, was now in the possession or power of the Defendant.

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On further directions,

Mr. *James Russell* and Mr. *Elderton* for the Plaintiff, insisted that he was entitled to indemnity, and also to compensation in respect of any damage which the absence of the title deeds might occasion to the marketable value of the estate : *Hornby v. Matcham (a)*.

Mr. *Terrell*, for the Defendant, submitted that there was no authority in support of the demand made by the Plaintiff for compensation, and that no such compensation was in fact asked for by the bill. The Defendant had taken the same care of the Plaintiff's deeds as of his own property, and more he would not, whether a bailee or a trustee, be required to do : *Jones v. Lewis (b)*. [VICE-CHANCELLOR.—The Master has found that the deeds are lost,—does not that throw upon you the necessity of shewing the absence of negligence?] It is submitted that the mere loss, without more, implies that there has not been negligence. [VICE-CHANCELLOR.—It implies a want of care.] He cited *Stokoe v. Robson (c)*, *Smith v. Bicknell (d)*, *Bentinck v. Willink (e)*, Maddock's Ch. Pra. tit. "Accident."

VICE-CHANCELLOR :—

Judgment.

The principal doubt I have had in this case was as to the jurisdiction. When the indemnity became no longer necessary, and the property was reconveyed to the Plaintiff, the Defendant ought at the same time to have handed over the deeds to the Plaintiff; and that not being done, the Plaintiff has, I think, a right to file his bill for the possession of

(a) 16 Sim. 325.
(b) 2 Ves. 240.
(c) 3 V. & B. 51.

(d) Cited Id.
(e) 2 Hare, 4.

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these deeds, or to have an inquiry into the circumstances, and for compensation. The Defendant is in the same position as that of a mortgagee whose debt is paid off, and is a mere trustee of the deeds for the Plaintiff. With regard to the difficulty of form, it is sufficient to say that I think, under the relief prayed, the Plaintiff may obtain such a decree as in the circumstances of the case the Court would consider him entitled to.

This case is not so strong and clear against the Defendant as in *Hornby v. Matcham* (a), where the mortgagee had, with his own hands, burnt the deeds when he was not aware of what he was about. I was referred to the case of *Smith v. Bicknall* (b), which is mentioned in a note to *Stokoe v. Robson* (c), in which it appears by the decree from the Registrar's book that no such relief was administered as is sought in this case. There the mortgaged premises were directed to be reconveyed, and such of the deeds as were not lost to be delivered up to the representatives of the mortgagor without any indemnity or compensation in respect of such deeds as had been lost. In that case it is true the deeds had been lost by a party who was dead, and his executors were not before the Court. The deeds had been in the custody of one of the executors of the mortgagee, and it might have been a question whether all the executors were answerable for property coming to the hands of one of them, or whether that executor or his representatives would not be answerable. It was in that case found that the deeds had been lost or stolen. The party sought to be charged was entitled to take the finding in its most favourable aspect, and that would be to assume that the deeds were stolen, in which case he would not be liable to the consequences. That is the effect of the case of *Jones v. Lewis* (d), where the Master found that the deeds had been stolen. The principle is, that a bailee is not liable for the

(a) 16 Sim. 325.

(b) 3 V. & B. 51, n.

(c) Id.

(d) 2 Ves. 240.

consequences of such an accident where all reasonable care has been taken. In the present case, the finding is, that the deeds were lost whilst they were in the possession of the Defendant, or whilst in that of Mr. *Shepherd*. It was said, that the Defendant was not liable for the acts of *Shepherd*; but the custody of the deeds was transferred to *Shepherd*, not by the consent of the Plaintiff, but solely for the convenience of the Defendant.

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It is a case in which a loss of property has occurred, which, so far as appears, must, I think, be attributed to negligence on the part of the person losing it, for which he must be answerable, unless he can discharge himself by shewing that it arose from some inevitable accident, from which in the ordinary course of events he could not guard himself.

The Plaintiff is entitled to have the abstract delivered up; but I do not see how he can have attested copies of deeds which cannot be obtained and may not be in existence. In the case of *Hornby v. Matcham*, the Vice-Chancellor of *England* seems to have given some special directions as to what would be a sufficient compensation which he thought should be given for the loss; but with reference to the claim for compensation which has been made in this suit, it must be borne in mind that the compensation to which he adverted was not in respect of any damages which might occur on the occasion of a future sale of the estate. The Vice-Chancellor says, "It is clear to my mind that some damage has been done to this estate by the destruction of the deeds and other documents, in addition to that which will be repaired by the furnishing of the fresh attested and office copies: for, in all future dealings with the estate, the decree and other proceedings in this suit will necessarily form part of the title; and the procuring office copies of these proceedings will be attended with an expense; for

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loss of property
by trustee
or bailee attributed
to negligence.

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which I think compensation ought to be made." That expresses the ground upon which he proceeded, and shews clearly that it was not upon any speculation as to the damages which the title might suffer from the absence of the deeds, upon a dealing with the property hereafter, as affecting the marketable value of the estate. I shall in this case follow the precedent there sent me, and direct an order to be drawn up in the same form, substituting for the word "destruction," which occurs in that case, the word "loss."

April 18th,
 19th & 23rd.

SPURRELL v. SPURRELL

A testatrix bequeathed her property to her mother for life, and at her decease gave a legacy of 200*l* to A., directing that then the residue should be equally divided between her surviving brothers and sisters:—

Held, that the word "surviving" referred to the period of distribution; and the mother having died before the testatrix, that the brothers and sisters living at the death of the testatrix were entitled to the benefit of the gift; and that there was, in the events which happened, no bequest to the brothers and sisters who died before the testatrix.

SARAH SPURRELL, spinster, by her will, dated in 1812, bequeathed as follows:—"It is my wish and desire for my mother, *Elizabeth Spurrell*, to have all and every of my property whatsoever, to hold and enjoy during her lifetime; and at her death, not exceeding twelve months after, first, that *Emla Rose Spurrell* has, by the executors in trust, kept in reserve for her 200*l*., to be given her at the age of twenty-four years, and then the residue of my property to be equally divided between my surviving brothers and sisters, share and share alike." And the testatrix appointed two of her brothers to be her executors. *Elizabeth Spurrell*, the mother, and *Emla Rose Spurrell*, the legatee, died in the lifetime of the testatrix, and the testatrix died in 1852.

At the date of the will, and at the time of the decease of the mother, there were four brothers and two sisters of the testatrix living. Between the time of the decease of her mother and the decease of the testatrix, three of her brothers

and one of her sisters died. The Plaintiff was the son of *John*, one of the deceased brothers, and he filed his bill against one of the surviving brothers of the testatrix, who was the administrator of her personal estate with the will annexed, claiming to be entitled, as one of the next of kin, to a share of four sixths of the residuary personal estate, on the ground that as to such four sixths no effectual disposition was made by the will, by reason of the death of four of the brothers and sisters of the testatrix in her lifetime.

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Statement.

The Defendant demurred.

On the argument of the demurrer, in addition to the facts stated in the bill, it was admitted by both parties at the bar,—that the testatrix had seven brothers and sisters; and that in the year 1804, and therefore before the date of the will, a sister of the testatrix had died, leaving six brothers and sisters then living, and that the father of the testatrix was dead at the date of the will.

Mr. *Walker* and Mr. *Sidebotham* for the Defendant, contended, first, that the word of gift to the testatrix's "surviving brothers and sisters," referred to those who should be surviving at her own death; and therefore that the gift took effect for the exclusive benefit of the Defendant and his sister, who were such survivors; and, secondly, that whether the words "surviving brothers and sisters" referred to the date of the will or the death of the mother, or the death of the tenant for life, it was a gift to a class which would enure for the benefit of the class within the description, and there would therefore be no intestacy: *Viner v. Francis* (a), *Shuttleworth v. Greaves* (b), *Doe d. Stewart v. Sheffield* (c), *Lee v. Pain* (*Benjamin Moore's*

Argument.

(a) 2 Cox, 190; S. C., 2 Bro. C. C. 658.

(b) 4 My. & Cr. 35.
(c) 13 East, 528.

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case) (a), *Doe d. Long v. Prigg* (b), *Buckle v. Fawcett* (c),
Taylor v. Beverley (d).

Mr. Rolt and Mr. Baggallay, for the Plaintiff, relied upon
Allan v. Callon (e), and *Ackerman v. Burrows* (f). They
cited also *Havergal v. Harrison* (g), *Wordsworth v.*
Wood (h), *Martin v. Wilson* (i), and *Neathway v.*
Read (k).

April 23rd.
Judgment.

The VICE-CHANCELLOR (after stating the terms of the
bequest and the state of the family): —

The Defendant raised two points in support of his claim
as the personal representative of the deceased, and on be-
half of himself and his surviving sister, either of which
would be sufficient to support the demurrer. The first con-
struction for which the Defendant contended was, that the
word “surviving” points to the death of the testatrix, and
not to the death of the mother, who, had she lived, would
have been tenant for life; and in case that construction
should fail, he contended, secondly, that the gift was a gift
to a class, the only members included in which, at the
time of the gift taking effect, were himself and his sister.
As I think the Defendant is entitled to succeed in his
contest on the meaning of the term “surviving,” it is not
necessary that I should enter into the consideration of
the several points.

I think the word “surviving” in this will, as applied
to the brothers and sisters of the testatrix, must mean “sur-
viving” at the time of the distribution of the fund. The

- (a) 4 Hare, 208, 250.
- (b) 8 B. & C. 231.
- (c) 4 Hare, 536.
- (d) 1 Coll. 108.
- (e) 3 Ves. 289, 294.

- (f) 3 V. & B. 54.
- (g) 7 Beav. 49.
- (h) 4 My. & Cr. 641.
- (i) 3 Bro. C. C. 324.
- (k) 17 Jur. 169.

word was capable of receiving four different constructions, which were suggested in the argument. Two of these constructions were favourable to the claim of the Plaintiff,—first, that the word “surviving” had reference to the date of the will, and is to be construed with reference to the fact (admitted on both sides) that the testatrix had had another sister, who was then dead, and that she therefore then used the word “surviving” as descriptive of those who were still alive; and, secondly, that the word “surviving” referred to the death of her mother, the tenant for life under her bequest, and that as her mother predeceased her the gift must take effect as if the six brothers and sisters living at the mother’s death had been named in the will. The two other constructions of the word are favourable to the case of the Defendant, they are,—first, that the word must be taken as applying to the survivorship at the death of the testatrix, when the will takes effect; and, if not, secondly, that it refers, not to the date of the will or to the time of the death of the mother, but to the period of distribution whenever that might happen, and which in the event was at the death of the testatrix. I think, as I have said, that the last is the true construction.

As to the first construction suggested, I think it would not be a natural interpretation of the word to construe it as referring to the death of a sister of the testatrix which had taken place before the date of the will. In every will the testator must be looked upon as contemplating a future distribution of his property. To use the word “surviving” in such a sense would not only be inoperative as to any legal effect, but it would be a senseless application of the word in the ordinary use of language. In adopting such a view of the meaning of the testatrix, we should suppose her emphatically to say, that she was giving her property to living, and not to deceased persons. Such a con-

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struction was contended for in *Taylor v. Beverley* (a). There the testator gave to his "surviving" children; and it was suggested that the gift should take effect at the date of the will, with reference to the fact that one of his children had previously died. The Vice-Chancellor *Knight Bruce* noticed the argument, but observed that such a construction could hardly be seriously contended for. It is true the same learned Judge, in the case of *Neathway v. Read* (b), asked the question, whether Mrs. *Neathway* had lost any child at the date of the will?—a fact which did not in that case appear to be ascertained. But in his judgment he observes, that, supposing for the sake of the argument that the fact had been so, although it added plausibility to the argument in the peculiar form of that will, it left it a matter of too much doubt. It would certainly be very inconsistent with the legal construction of language—a principle of which is to give some effect to every word—to suppose that the testatrix meant to say that the gift was not intended for a deceased party; and to adopt that construction would lead to the result of actually giving shares to other dead brothers and sisters of the testatrix when her will comes to take effect.

As to the construction,—the first of those which are favourable to the Defendant's arguments—referring the word "surviving" to the time of the death of the testatrix; it seems to me that of late years, where there is a tenancy for life and a gift over to other persons depending upon words of survivorship, the Courts rather incline to ascertain the persons who take in remainder, not by reference to the decease of the testator or testatrix, but of the tenant for life. It has been thought unreasonable that the testator should suppose the legatee would die in his lifetime. I think the view taken in *Cripps v. Wolcott* (c) was extremely just;

(a) 1 Coll. 114.

(b) 17 Jur. 169.

(c) 4 Madd. 11.

and although that has been said to be a bold decision, yet many cases which preceded it had taken the same view. The only difference seems to be, that, before the case of *Cripps v. Wolcott* (a), there had been a general notion that the rule was, that the word "survive" pointed to the death of the testator, but that particular cases might be taken out of that general rule by exceptions; and when at last the exceptions grew up to be numerous, the boldness of the decision consisted in holding that there was no such general rule. I think it better that the Court should hold that there is no rule referring the time of survivorship of the legatee to the death of the testator. The natural inference is rather the other way; and the Court must ascertain the true meaning of the testator, after looking at every portion of his will.

Is, then, the gift in this case so limited that it must take effect in favour of the brothers and sisters who are surviving at the death of the tenant for life, and do they then take immediate interests in the residuary personal estate as tenants in common, so as to create a lapse in the event of the death of them before the testator; or is it not so limited that the gift will take effect at the period of distribution, which will be at the death of the tenant for life, if there be one living at the death of the testatrix, or, if not, at the death of the testatrix; so that in any event the period of distribution is the time to which the survivorship is to be referred? It appears to me that the common-sense view, independent of any technical reason for so expressing it, would be, that when the testatrix was pointing out what should be done in the distribution of her property, having given a life interest to her mother, and then allotted out of her estate 200*l.* to one party, and given the rest to her surviving brothers and sisters, her words would point naturally

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(a) 4 Madd. 11.

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to the event of their being alive at the time when they would be entitled to receive the benefit of the gift. This is in accordance with the expression in the commencement of Lord Justice Knight Bruce's judgment in *Seathway v. Read* (a): "Unless there be an explanatory context, this must be taken to mean children who may be living at the death of the survivor of *Catherine Seathway* and the testatrix, which survivor was *Catherine Seathway*;" meaning clearly thereby the period of distribution, for the expression is equivalent to "those who may be surviving when the event arises."

I was desirous of looking into the authorities on this point, and I have found one before Sir *W. Grant*, which appears to me to be a stronger case than this: it is *Daniell v. Daniell* (b). The words were as strong as could be conceived for the purpose of pointing out that the survivors were to be those who were in existence at the decease of a particular tenant for life. It was a trust, after the death of the testator's wife, to pay the interest of a sum of money to his sister *Jane* for life; and after her death, the capital was to be paid to her two sons *James* and *Francis*, in case they should be alive at the time of their mother's decease; and if either were then dead, the whole was to go to the survivor. The sister *Jane* died first, then *Francis*, and then the testator's widow, leaving *James* surviving; and he was held to be entitled alone, although his brother *Francis* had survived his mother as well as himself. That case, although a little different in the circumstances, seems to me to be in principle the same as this. The testator contemplated that the parties would die in the order in which she named them. And so here; the testatrix apparently contemplated that her own death would be before that of her mother. It seems to me that the period to

(a) 17 Jur. 169.

(b) 6 Ves. 297.

which the word "surviving" refers is the period when the fund came to be distributed—when the event has happened which is to guide the executors in making distribution. On that construction of the word "surviving" I think the Defendant is right, and that there has been in the event no intestacy.

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This view of the case is plainly independent of any consideration of the question which was argued with regard to the effect of the gift to a class, which is a question of difficulty, into the consideration of which I do not enter.

An arrangement was made for converting the form of the proceeding into a motion for a decree, upon which a declaration of the rights of the parties under the will could be made in conformity with the above judgment.

DUNN v. COX.

April 25th.

THE Plaintiff was the administrator of his brother, *William Dunn*, who had been a lieutenant in her Majesty's army, and depôt paymaster at the time of his death; and Messrs. *Cox & Co.*, the Defendants, had been his agents.

A bill to set aside, on the ground of fraudulent representation, an order in an action at law made by consent, staying the action and directing the payment of a certain sum of money by the Defendant to the Plaintiff, and which

The bill stated that *William Dunn* died in 1840; and that, in 1846, on the application of the Plaintiff for an account of the property of his brother come to the hands of the Defendants, they furnished him with an account, in

sum the Plaintiff afterwards accepted:—*Held*, to be demurrable, as it did not state that the Plaintiff was ignorant of the alleged representation being fraudulent, not only at the time of the order, but at the time he received the money.

It appearing that a second action had been brought by the Plaintiff, and had been stayed by the Court of law, in consequence of the consent order made in the first action; and that the Plaintiff had taken regular proceedings at law to set aside the order staying the second action, but that order had been sustained; this Court refused to aid a suit in equity brought by the Plaintiff by giving him leave to amend, upon allowing a demurrer to his bill to set aside the consent order on the ground of such alleged fraud.

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which they admitted receipts of monies of the deceased to the amount of 557*l.* 1*s.* 2*d.*, and stated, on the debtor side of the account, payments or charges to the amount of 257*l.* 5*s.* 2*d.*, leaving a balance of 199*l.* 16*s.*; that the Plaintiff, having obtained letters of administration of the estate of his brother, applied to the Defendants for payment of such balance; and payment having been refused, he took proceedings at law against them to recover it, and ultimately the following order of the Court of Exchequer was made in his action:—

“DUNN v. COX and Others—TRINITY TERM.—10 VICT.

“*Saturday, the 12th of June, 1847.*

“Upon reading the rule made in this cause of the 20th day of April last, and upon hearing of Mr. *Martin*, as counsel for the Plaintiff, and of Mr. *Attorney-General*, as counsel for the Defendants, it is ordered by consent, that the said rule be discharged, and that no further proceedings be taken herein; and further, that the Defendants do pay to the Plaintiff the sum of 150*l.*, in full of all demands for debt and costs in this action, or on any other account whatsoever.

“By the Court.”

The bill stated that the order was made and taken without the Plaintiff's authority or consent; that, however, the Plaintiff received the 150*l.*, and also the 10*l.* which the Defendants had previously paid into Court in the action; and then followed these statements:—

Paragraph 7.—That, since the order of the 12th of June, 1847, was made, the Plaintiff has discovered, as the fact is, that the said account delivered to him by the Defendants was false and fraudulent, and that the several sums therein mentioned on the debtor side thereof never were paid by the Defendants, or allowed to or on account of *William Dunn*,

or dealt with in the manner stated in the said account; but the same have always remained, and still remain, in the hands of the Defendants, who wilfully and fraudulently represented the amount thereof to have been paid on account of *William Dunn*, well knowing that they had not been paid, or in any manner applied for the benefit of his estate, and that all his regimental debts had been fully paid by the committee appointed for that purpose, and that the sum paid into their hands was to be paid over to the legal representative.

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Paragraph 8.—The Plaintiff, having so discovered the said fraud of the Defendants, on the 11th of November, 1852, commenced a second action against them in the Exchequer of Pleas, to recover from them, as administrator of his said brother, the sum of 800*l.*; but, on the production by the Defendants of the said order of the 12th of June, 1847, and upon proof of the bringing of the previous action by the Plaintiff, an order was made in the said last-mentioned action, dated the 23rd of November, 1852, staying all further proceedings therein, and the Plaintiff has taken regular proceedings to discharge the said order; but the Court of Exchequer has refused to discharge the same. The Plaintiff, therefore, is unable to proceed in a Court of law to try his right as against the said Defendants, to recover from them the assets of *William Dunn*, come to their hands as his agents, and can have no relief in the premises except in a Court of equity.

The bill prayed an account of the assets of *William Dunn* come to the hands of the Defendants as his agents, and of what had become of such assets; and that the Defendants, if necessary, might be restrained from setting up or using, in the action commenced by the Plaintiff on the 11th of November, 1852, the order of the 12th of June, 1847, or any receipt given by the Plaintiff in respect of the

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said sum of 160*l.*, or the said order of the 23rd of March, 1852, staying the proceedings in the said action, the Plaintiff undertaking to give credit in the action for the 160*l.*

Argument.

The *Solicitor-General* and Mr. *Wickens* for the Defendants, in support of the demurrer, contended, first, that the bill did not aver that the Plaintiff was not fully aware of the grounds on which he now sought to open the account at the time he received the 160*l.*, although it averred that he had made the discovery since the order was made; and that the bill, therefore, did not state a case upon which, if proved, the Plaintiff would be necessarily entitled to relief; and, secondly, that the case stated was one in which, if the Plaintiff could shew sufficient merits, it was perfectly competent for the Court of Exchequer to relieve him by allowing the action to proceed. This Court would not interfere with the power which the Court of Exchequer, or any other Court, exercised over its own proceedings in staying actions brought before it: *Cocker v. Tempest* (a).

Mr *Daniel* and Mr. *Drewry* for the bill.—The bill is founded on the common equity of relieving against fraud, and it is perfectly unimportant whether the fraud be effected by means of the machinery of a Court of justice or otherwise. The Plaintiff was induced to accept the terms specified in the order of the Court of Exchequer in June, 1847, by the misrepresentation of facts, the truth of the matter in question being, at the same time, within the knowledge of the parties making the representation. If the case at law had been carried further, and there had been a verdict and judgment, instead of a mere consent order, the Court would nevertheless have relieved the Plaintiff in such a case. This is expressly laid down by Lord *Hardwicke*, in *Wil-*

(a) 7 M. & W. 502.

liams v. Lee(a), where he says, "As to relieving against verdicts for being contrary to equity, these cases are, where the Plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, and the Defendant was ignorant of it at the trial; as where the Plaintiff's action might be for a debt, and the Defendant, after the verdict, discovers a receipt for the very demand in the action: here the Court would relieve." The principle is the same, whether the Plaintiff or Defendant be prejudiced by the fraud. But the order made in this case cannot be placed as high as a judgment, and would not be admitted in this Court as conclusive: *Samuda v. Furtado*(b). The circumstance of the matter having been before the Court of *Exchequer*, and of that Court having, on the ground of the consent order, stayed the proceedings in the second action, does not constitute any impediment to the ordinary jurisdiction of this Court on the same matters. The jurisdiction of the Court in circumstances of that nature was recently affirmed in a much stronger case than the present, in which an application was made to restrain execution upon a judgment against a Defendant at law, on the ground of a subsequent release by the Plaintiff at law of his claims under the judgment, for a valuable consideration paid by the Defendant at law, notwithstanding that a rule obtained by the Defendant at law to set aside the judgment on the ground of such subsequent release had been discharged, and notwithstanding, also, that a writ of *audita querelâ*, on the same ground, had been set aside by the Court of law: *Williams v. Roberts*(c). The application failed on the merits, but the jurisdiction was considered to be clear, although the same point had been twice tried at law, once on the rule to set aside the judgment, and again on the rule to set aside the writ. The stay of proceedings by the Court of *Exchequer* was not accurately described as a mere rule or order made by that Court,

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(a) 3 Atk. 223. (b) 3 Bro. C. C. 72. (c) 8 Hare, 315.

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with regard to its own process as in the case of *Cocker v. Tempest*. By the effect of the Common Law Procedure Act '15 & 16 Vict. c. 76, s. 226, the rule of one Court made in the action operated as a bar to the proceedings in any other Court of law, and it therefore left the Plaintiff without remedy except in equity. The mere omission to state in the bill, that the fraudulent representation of the Defendants was not known to the Plaintiff between the time when the order was made and the time when 160*l*. was received, if it be material, is an accidental omission which may be corrected by amendment.

The VICE-CHANCELLOR said, that the consent order made by the Court of *Exchequer* in 1847, had the effect of a general release of the Defendants in respect of the Plaintiff's claim; and that, such being the case, the Plaintiff was bound to shew by his bill, that he did not know of the grounds now alleged for setting aside the order at the time he received the 160*l*. The bill did not state that he was not then aware of the facts, and therefore the demurrer must be allowed. Upon this point, however, the Court might give the Plaintiff leave to amend. Assuming the consent order to be equivalent to a release, and that the Court of *Exchequer* would try the question, whether that release had or had not been obtained by fraud, it might not therefore follow that this Court would not exercise its concurrent jurisdiction on the subject.

The *Solicitor-General* in reply submitted, that it was not a case in which the Court would encourage litigation, by giving the Plaintiff leave to amend his bill. If the Plaintiff had any distinct or intelligible grounds for his allegation, he would not have confined himself to a vague and general statement, that the account rendered by the Defendants had been false or fraudulent, but would have mentioned some fact upon which he rested the charge. However, the

allegation must be taken as it stood; and to what did it amount? The Plaintiff brought his action, to which the Defendants pleaded. That plea, whatever it was, was put in by the Defendants at their peril. The parties were at arm's length, and the Plaintiff might have put the Defendants on the proof of the facts which they had pleaded. If they had failed to prove them, the Plaintiff would have recovered. The Plaintiff, instead of requiring the Defendants to vouch their discharge, chose to accept a sum of money, and give them a release; and now he came into equity to set aside that release, averring, in substance, nothing more than that the Defendants, if the case had gone to trial, could not have proved their plea. No Court, either of law or equity, would permit a case to be re-opened on such a ground. No doubt, equity had jurisdiction in every species of fraud; but if a question of fraud had been brought before another Court, having concurrent jurisdiction to deal with it, and had there been decided, this Court would not entertain a suit for the trial of the same question. That the question of fraud had been distinctly tried in the Court of Exchequer must be inferred from the allegation in the bill, that "the Plaintiff has taken regular proceedings to discharge the order" staying his second action. The question whether the former order had been obtained by fraud would necessarily have been the principal issue in the "regular" proceedings to which the Plaintiff refers, and the refusal of the Court to discharge their order is a decision against him.

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Argument.

VICE-CHANCELLOR:—

The demurrer must be allowed on the ground which I have stated; but I entertained some doubt whether I should not give the Plaintiff leave to amend. On the merits, the bill certainly presents the most shadowy case which can be imagined. Except in the seventh paragraph, there is no ground stated for getting rid of the effect of the

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—
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consent order. It comes to this, that, the Plaintiff having given a general release on an account presented to him, he now seeks to open that release. He does not by his bill quarrel with any of the items on the receipt side of the account. The seventh paragraph complains of errors or misrepresentations only on the payment side, therefore I must consider that the entries on the receipt side are correct and sufficient. I am not prepared to say that a bill might not be filed in this Court to open the transactions in a case where an action had been brought, and the Plaintiff in the action had been induced to accept a sum of money by the production of an account which he afterwards found to be false; but the case made by this bill is, that, having discovered the alleged fraud, the Plaintiff brought a second action in 1852 for 800*l.*: the action thus brought could not have been merely in respect of the items objected to in the former account rendered by the Defendants, but it must, from its amount, be founded on the general claims of the Plaintiff against the Defendants. Now it would clearly have been competent to the Plaintiff to proceed in this action unless the order in the former action had been held to amount to a general release. The existence of that release was the only suggested ground on which the action could be stayed. The answer of the Plaintiff would obviously be, that this release was given upon the faith of a statement by the Defendants in which he reposed confidence, and which they knew to have been untrue, but yet did not undeceive him. The question, whether the Plaintiff was under the circumstances bound by the release, would therefore be the question directly in issue before the Court of Exchequer. I think, from the allegation in the eighth paragraph of the bill, that the Plaintiff has taken all regular proceedings to set aside the order staying his action, I must infer that he has brought before the Court the case on which he relies for getting rid of the effect of the consent order; and that the Court of Exchequer has determined that there is no

sufficient case for opening the account. Although this Court has, no doubt, concurrent jurisdiction in cases of fraud, yet where the question of fraud has been carried before another Court, and that Court has in its view of the merits of the case determined that the consent order which was made in the former action ought to stand, I do not think it is a case in which this Court should give any extraordinary assistance to the institution of a new suit, and I do not think therefore that the case is one in which I ought to give leave to amend.

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BRIGGS v. CHAMBERLAIN.

THOMAS PICK, by his will dated in 1841, after making certain devises and bequests, gave, devised, and bequeathed certain hereditaments and all other his real estate not therein otherwise disposed of, and also his residuary personal estate, to *Joseph Chamberlain* and others, upon trust to sell and dispose of the real estate, and get in and convert into money the personal estate not consisting of money, and thereout to pay the costs of such sale, and his debts and funeral and testamentary charges and expenses, and the pecuniary legacies therein mentioned; and as to the residue of such money upon trust to invest the same in or upon parliamentary stocks, or public funds, or other government or real securities, and to pay and apply the interest, dividends, and annual produce of the said stocks, funds, and securities unto and for the benefit, maintenance, education, and advancement of all and every the children and child of the testator's late nephew *John Exton North*, who might be living at the time of his (the testator's) decease, in such manner, shares, and proportions as the trustees should think fit, until the youngest of such children should attain his

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6th.

The interest of a married woman in the proceeds of real estate, devised by the will under which she took such interest, upon trust for sale, held to pass by her deed executed and acknowledged according to the provisions of the stat. 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of conveyance, whether such interest be in possession or reversion, and whether the sale of the real estate be or be not made.

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or her age of twenty-one, and upon his or her attaining twenty-one, upon trust to pay and assign the whole of the said residuary trust monies unto all and every such children of his said nephew, and to the issue of such as should be dead leaving issue then living, such children and issue, if more than one, to take in equal shares as tenants in common; and in case any one or more of the sons or son of his said nephew *John Exton North* should die under twenty-one without issue him surviving, or being a daughter or daughters under the age of twenty-one years and without having been married, then the testator directed that the share or shares of him, her, or them so dying, as well original as accruing, should go and be paid to the survivor or survivors of them the said children and the issue of the deceased children as aforesaid. And the testator thereby empowered his trustees, at their absolute discretion, to postpone the sale of his real estate; but he declared, that such postponement should not prevent it from being deemed to have the character and quality of personal estate immediately after his (the testator's) decease, and he directed that the rents should in the meantime go in the same manner as the annual income of the produce of the sales thereby directed would have gone.

The testator died in April, 1842, leaving seven children of his nephew *John Exton North* surviving. *Mary*, one of the children, in 1833 intermarried with the Defendant *Samuel Street*. By an indenture, dated the 12th of February, 1846, made between *Samuel Street* and the said *Mary* his wife of the one part, and the Plaintiff *William Briggs* of the other part, (and which said indenture was by the said *Mary* duly acknowledged according to the provisions of the Act of Parliament for abolishing fines and recoveries^(a)), all the part and share of them the said *Samuel*

(a) Stat. 3 & 4 Will. 4, c. 74.

Street and *Mary* his wife, or either of them, of and in the residuary real and personal estate of the said testator, were assigned by the said *Samuel Street* and *Mary* his wife unto the said *William Briggs*, his executors, administrators, and assigns, for securing the repayment to the said *William Briggs*, his executors, administrators, and assigns, of the sum of 400*l.* and interest. The deed contained a covenant by *Samuel Street* to pay the premiums upon two policies of insurance, with liberty, in case of default, that the said *William Briggs* should pay the premiums and hold the mortgage deed as a security for their repayment to him with interest. Notice of the incumbrance was given to the trustees and executors.

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A subsequent mortgage of the interest of *Samuel Street* and *Mary* his wife in the residuary estate of the testator was made in March, 1847, to *James Sparling*, which security was afterwards assigned to *James Moss Sparling*.

In November, 1847, a fiat in bankruptcy issued against *Samuel Street*.

Some portions of the real estate devised by the will of the testator to the children of his nephew, *John Exton North*, had been sold by the trustees before the institution of the suit, and other parts of that estate were sold before the Master under the decree in this cause. The personal estate was exhausted in the payment of debts.

The bill was filed in 1848 by the Plaintiff, *William Briggs*, against the trustees and executors of the testator, and also against the other incumbrancers on the interest of *Samuel Street* and *Mary* his wife in the testator's estate, and the other residuary legatees of that estate, for the execution of the trusts of the will, and the transfer to him (the

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Plaintiff) of the interest of *Samuel Street* and *Mary* his wife therein.

Mr. *Glasse* and Mr. *Smythe* for the Plaintiff, addressed themselves to the argument in support of the title of the Plaintiff under the assignment to him of the 12th of February, 1846, and by virtue of the acknowledgment of *Mary* the wife, made according to the Act 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries. They relied on the 74th section of that Act, as aided also by the interpretation of the words "lands" and "estate" given by the 1st section. They also cited *May v. Roper* (a), *Forbes v. Adams* (b), *Duberley v. Day* (c), *Goodrick v. Shotbolt* (d), *Donne v. Hart* (e), *Doe d. Shaw v. Steward* (f), *Pearson v. Lane* (g), Cases and Opinions of Eminent Lawyers, Lond. 1791, vol. 2, p. 117, and *Hunter v. Judd* (h).

Mr. *Sparling* for the second mortgagee, whose assignment was not acknowledged, submitted that it was nevertheless a valid charge on the equitable interest of *Samuel Street* and *Mary* his wife under the will.

Mr. *Rogers* for the assignees of *Samuel Street*.

Mr. *Baggallay* for *Mary Street*, the wife, and her children, submitted that the will of the testator operated as a complete conversion of the real estate into money; and that being in the state of money, according to the express will of the testator, and in fact the acknowledgment under the Fines and Recoveries Act could not be of any avail.

(a) 4 Sim. 360.

(b) 9 Sim. 462.

(c) 16 Beav. 33.

(d) Prec. Cha. 333.

(e) 2 Russ. & My. 360.

(f) 1 Ad. & E. 300.

(g) 17 Ves. 101.

(h) Before the Vice-Chancellor of England. Cited from a MS. note of Mr. *Shapter*.

He relied on *Hobby v. Allen* (a), *Stiffe v. Everett* (b), *Clark v. Cook* (c). There was also this distinction between the case of *May v. Roper* and the present case, that the one was a reversionary interest and the other an interest in possession, and that in the former there was a positive direction to sell without any discretion being left in the trustees to defer the sale. The same difference in the facts distinguished this case from that of *Forbes v. Adams*. They were cases in which there was indeed a power to sell, but without any distinct trust for sale.

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Mr. Russell and Mr. Fleming for the executors.

VICE-CHANCELLOR:—

The question which was reserved for the decision of the Court was, whether the conveyance by a married woman of her interest in real estate devised for sale by the will under

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(a) Cited from 15 Jur. 835. This case, from the coincidence in date, and in the names of the parties, seems to be the same case which is reported in 4 De G. & S. 289, under the name of *Hobby v. Collins*. There is, however, a material difference in the two representations of what fell from the Vice-Chancellor. According to the report of the case in the Jurist (vol. 15, p. 836), which was the report brought before the Court in the principal case, the judgment of Sir J. L. Knight Bruce, V. C., was in the following words: "The object of this petition is the reversionary interest of a married woman in a sum of money charged on land. I think that the married woman can do no

act to affect such an interest during the life of the tenant for life. This does not come new upon me. It is a point upon which my mind has long been made up. I must dismiss the petition." In 4 De G. & S. 291, the judgment of his Honor is thus given: "It appears to me doubtful, at least, whether Mrs. Hodges' right to her 250*l.* will be affected by what has been done, if she shall become a widow in her mother's lifetime. The point is not new to me, as I have had occasion more than once to think of it." It would appear that the report in the Jurist is inaccurate, at least in stating that his Honor dismissed the petition.

(b) 1 My. & Cr. 37.

(c) 3 De G. & S. 333.

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which the interest arises, was sufficient to pass such interest. The Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance (a), was, as it appears to me, not only intended to embrace an interest of this kind, but does by its express words include it. The interpretation clause (b), by which the Act is introduced, points out to what the Act is to extend. Under the word "land" it would appear that the Legislature designed that every possible description of real estate should be included, and the definition of the word "estate" is not less comprehensive. The word estate, it is said, "shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting land, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money, subject to be invested in the purchase of land." Words could scarcely be found more general in operation or more clearly expressed than the first words of this interpretation clause, which define the word to mean "an estate in equity as well as at law." That the Act was intended to have full and ample operation in the case of a married woman, is clear upon the 77th section, which enacts that it shall be lawful for every married woman, in every case but that of a tenant in tail, by deed "to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure or in any such money as aforesaid." These words, therefore, enable a married woman, by her deed acknowledged according to the provisions of the Act, to dispose of any interest in land either at law or in equity, or any charge, lien, or incumbrance in or upon or affecting land, either at law or in equity. Now, what is

(a) 3 & 4 Will. 4, c. 74.

(b) Sect. 1.

the property in question? It is an interest in land which has been given by the will of the testator to a lady who has executed a disposition under this Act. The argument which has been addressed to the Court against giving effect to the disposition so made has been,—that, as the land was directed by the will to be and has been converted into money, the Court will regard it as money only, and therefore as a species of property which could not be disposed of by means of a fine, and cannot now be disposed of by any conveyance substituted for a fine. I should have had no doubt or hesitation in saying that the interest of this lady under the will of the testator might be disposed of by deed executed and acknowledged according to the Act, if it had not been for the case of *Hobby v. Allen* (a), in which the then Vice-Chancellor *Knight Bruce* is reported to have come to a different conclusion. This decision directly conflicts with the case of *May v. Roper* (b). I cannot distinguish the two cases. A difference suggested is, that in one case the interest was reversionary; but the question does not turn on the difference between an interest in possession and an interest in reversion. The question is, whether it is an interest in land which can pass by a fine, or by a deed having a like effect.

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In *May v. Roper* there was a devise of real estate in trust for sale, and out of the proceeds to set apart 2000*l.* for the testator's widow for her life, and to invest the residue until the eldest of the testator's children should attain twenty-one, or marry with his wife's consent, and then to divide the principal monies into as many shares as there were children; and he directed that the shares should be paid to them as they respectively attained twenty-one, or married with such consent; and after the decease of his wife he directed that the 2000*l.* should be divided in the same

(a) 15 Jur. 835. See n. (a), p. 73, ante.

(b) 4 Sim. 360.

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manner as the residue. The testator left his widow and five children; and the widow afterwards devised a messuage to her executors in trust for sale, and to invest the proceeds and her residuary personal estate upon trust for the children, and pay one-fifth to them respectively as they should attain twenty-one. Both wills directed that the real estate should be absolutely converted. The real estate was sold, either wholly or partly, under the decree in the suit. All the children attained twenty-one, and one of the daughters and her husband executed a mortgage of her share and interest in the monies produced from the real and personal estate under both wills, and covenanted to levy a fine of the share and interest thereby assigned, and the fine was levied accordingly. The Vice-Chancellor of *England* held, that the fine barred the wife of all the interest that she could derive, either from the land, or the proceeds of the sale of it. His Honor referred to the case of *Goodrick v. Shotbolt* (a), in which perhaps the question did not so distinctly arise, as in the case then before him. There is then the case of *Hunter v. Judd* before the same learned Judge, which was cited from Mr. *Shapter's* note, and in which it was held that the fine bound the interest of the wife in the freehold and leasehold estate to which the married woman was entitled. Next, there occurs the case of *Forbes v. Adams* (b), in which the property that passed by the fine was clearly in the shape of money. It was money which was subject to a direction to be laid out in land, and which money was the proceeds of a charge created on an estate in *Jamaica*. The acknowledgment of the mortgage before a magistrate was by the law of that colony analogous to a fine; and the Vice-Chancellor of *England* says, that Mrs. *Forbes*, by her execution and acknowledgment, gave the same effect to the conveyance as if the estate had been in this country and she had levied a fine; and he adds, "In that case all pos-

(a) Prec. Cha. 333.

(b) 9 Sim. 462.

sible interest that she might have previously had, either at law or in equity, in the estate, would have been barred" (a).

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In the case now before me there is a devise to trustees to sell the real estate of the testator, and out of the proceeds this lady, and the other children of the testator's nephew, are to be paid their respective shares. There is, therefore, a legal and an equitable interest created, and that equitable interest in the estate is not in the trustees, but in the several persons for whose benefit the sale is to be made. The lady has an equitable interest in her share, and the case appears to me to fall as distinctly as it can do within the words of the statute. If that be so, how can I refuse to give effect to the language of the statute? It is to be regretted that the learned Judge who decided the case of *Hobby v. Allen* did not give his reasons for the judgment, as it would have been satisfactory to have known the exact grounds on which it proceeded. I do not think there is any substantial distinction on this point between this case and that of *May v. Roper*, or *Forbes v. Adams*. My own impression has always been that a fine bars every possible interest of this kind; and, notwithstanding the great attention due to the opinion of the learned Judge who decided *Hobby v. Allen*, which has caused me to hesitate, I think I am bound to hold that the interest of the married lady in the real estate under the will in this case passed by her deed.

(a) 9 Sim. 467.

1822.

April 15th &
18th.

EDELSTEN v. VICK.

The Plaintiffs, who represented the original patentees of an article, the patent for the manufacture of which had expired, continued to use labels on their goods, printed from the original blocks belonging to the patentees, on which labels the goods were described as patented. The Defendants adopted and issued labels, closely resembling those of the Plaintiffs. And under such circumstances, although the description of the Plaintiffs' goods on their labels as being patented, had ceased to be strictly true, the Court granted an injunction, restraining the Defendants from using labels bearing an inscription appearing to designate the goods contained therein as being manufactured by the Plaintiffs.

THE bill was filed by *Peter Edelsten* and *John Alfred Williams*, against *Joseph Vick* and another; and it stated, that, in December, 1838, and for some time previously, *Daniel Foote Tayler* and *Henry Shuttleworth* carried on business in copartnership as manufacturers of pins; and that they were the proprietors of certain letters patent, dated the 21st of August, 1837, which had been granted to them for the manufacture of solid-headed pins, being a renewal of certain earlier letters patent of May, 1824, which had been granted to one *Wright*; and that *Tayler* and *Shuttleworth* manufactured and sold solid-headed pins under such letters patent; and they had also been appointed pin manufacturers to her Majesty and other members of the Royal Family: that *Daniel Foote Tayler* retired from business in December, 1838, and the business was afterwards carried on under the letters patent by *Shuttleworth* alone, under the style of *D. F. Tayler & Co.*: that *Shuttleworth* became bankrupt in December, 1839, and the business was thenceforward carried on by the assignees under the bankruptcy, under the same style, for the benefit of the creditors of *Shuttleworth*, until October, 1842, when the pin machinery and effects, and all the interest of the assignees in the letters patent, with the right or privilege of carrying on the trade of pin manufacturers under the style or firm of *D. F. Tayler & Co.*, and the engraved plate and drawings relating thereto, were sold and assigned to the Plaintiffs.

The bill then stated, that the Plaintiffs had removed the manufactory from *Woodchester*, where it had been theretofore carried on, to *Birmingham*; and that they had carried on the business under the style or firm of "*Edelsten & Williams*,

late *D. F. Tayler & Co.*," and had used such style or firm in their invoices, price lists, and address cards, and generally in communications addressed directly to their customers; but in goods made up for sale to the public, the Plaintiffs had in many cases continued to use the old labels of the said firm of *D. F. Tayler & Co.*, printed from the old engraved plates and wooden blocks of such firm; and, in particular, the Plaintiffs had, in making up for sale solid-headed pins of the best quality, manufactured by them according to the method of the said letters patent, and with the improvements subsequently introduced in the process, continued to use such old labels; and the solid-headed pins manufactured by the Plaintiffs, and made up in packets with such labels, are known to the trade and the public as the pins of *D. F. Tayler & Co.*; and such pins so made up are well known and are in great demand, not only in the *United Kingdom*, but also on the continent of *Europe* and in *America* and *Australia*; and the Plaintiffs have enjoyed great reputation with the public on account of the good quality of the said pins, and have made great gains by the sale of them. That Plaintiffs make up their best solid-headed pins in sheets of paper of a pink colour, each sheet containing twelve or ten rows of pins, six or five rows at each end of the sheet, with a vacant space in the centre of the sheet; and in such vacant space there is printed or stamped in green ink, as well on the outside as on the inside of the sheet, a label or stamp by means of the said old engraved plates; and the Plaintiffs make up pins to be sold by wholesale, by inclosing twelve of such sheets in one wrapper, and each such wrapper has a label or stamp printed or stamped on the outside thereof in green ink, by means of one of the said old wooden blocks. That the label on the outside of the said sheets consists of an ornamental border, with the following words printed within such border, viz., "Solid Headed Pins. *D. F. Tayler & Co.*, exclusive Patentees, and specially appointed Manufacturers

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to Queen Victoria and all the Royal Family, London." That the label on the inside of the said sheets consists of an ornamental border, with the following words printed within such border, viz. — The inimitable Patent Solid Headed Pins, exclusively made by *D. F. Tayler & Co., London*, on a new and improved principle, are unlike those of any other manufacture, in consequence of the whole pin being formed of one piece of wire, whereby the head is rendered immovable and its slipping off impossible; also *D. F. Tayler & Co.'s* unequalled Drilled Eyed Needles." That the label printed on the said wrappers consists of the Royal Arms with the following words: "By Her Majesty's Patent. Solid Headed Pins, exclusively manufactured by *D. F. Tayler & Co.* under appointment from Queen Victoria and all the Royal Family. *D. F. Tayler & Co.'s* Solid Headed Pins. London."

The bill then stated, that the letters patent so granted to *Daniel Foote Tayler* and *Henry Skuttleworth* had expired.

The bill then stated, that the Plaintiffs had lately discovered, and the fact was, that the Defendants, pin manufacturers of Birmingham, have manufactured and sold considerable quantities of solid-headed pins; and that they have fraudulently made up such pins for sale in sheets of paper of the same colour as the sheets sold by the Plaintiffs, and impressed with labels or stamps in the same colour, and made in imitation of and closely resembling the labels so as aforesaid used by the Plaintiffs; and that the Defendants have so done for the purpose of passing off and enabling others to pass off the pins manufactured by them for the pins of the Plaintiffs; and that the Defendants have sold a considerable quantity of pins so made up. That the labels printed on the outside of the sheets of pins so made up by the Defendants has an ornamental border precisely resembling the ornamental border of the label printed on the outside of the

Plaintiffs' sheets, save that on the ornamental border of the Defendants there are introduced the following words, viz. "*J. Vick*, from the late." That such words are printed separate and distinct from the words within the border, and are so arranged as not to attract the attention of ordinary purchasers. That the words within the border on such labels of the Defendants are precisely the same and printed in precisely the same character as those on the Plaintiffs' label, save that the order of two of the lines is changed. That the label printed on the inside of the said sheets of the Defendants has an ornamental border precisely resembling the ornamental border on the label printed on the inside of the Plaintiffs' sheets; and the inscription on such label on the Defendants' sheets is printed in letters precisely resembling the Plaintiffs', and is as follows: "The inimitable Patent Solid Headed Pins, made on a new and improved principle, are unlike those of any other manufacture, in consequence of the whole pin being formed of one piece of wire, whereby the head is rendered immovable, and its slipping off impossible." And that the label printed on the outside of the wrappers used by the Defendants as aforesaid, differs from the label printed on the outside of the Plaintiffs' wrappers only in having the following words added to it: "*J. Vick*, from the late." The bill stated, that the Plaintiffs, on becoming aware of such fraudulent acts on the part of the Defendants, did, by their solicitor, apply to the Defendants, requiring them to desist from using labels and wrappers counterfeiting the labels and wrappers of the Plaintiffs, and stating that proceedings would be taken against the Defendants, unless they engaged not to use such labels and wrappers; that the Defendants had not complied with such request, and had by their solicitor stated, in answer to such application, that they would defend any proceedings that might be taken.

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The bill charged, that the Defendants had made consi-
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derable profits by the sale of pins made up in such sheets and wrappers as aforesaid, and that they ought to account for the same to the Plaintiffs; and it prayed, that the Defendants might be restrained by injunction from making or causing to be made, or using, any engraved plates or blocks resembling or made in imitation of the said engraved plates and blocks of the Plaintiffs, and from making up pins and selling pins made up in sheets or packets impressed with the said labels or stamps of the Defendants, or having printed or impressed thereon any labels, stamps, devices, or marks resembling or made in imitation of the said labels of the Plaintiffs, or having printed or impressed thereon any inscription consisting of any combination of words intended or appearing to designate the said firm of *D. F. Tayler & Co.* or the Plaintiffs; and that an account might be taken of the profits made by the Defendants from the sale of pins made up by them in sheets and packets impressed with the said labels or stamps, and that the Defendants might be ordered to pay the amount of such profits to the Plaintiffs.

The Plaintiffs moved for the injunction, according to the prayer of the bill.

Argument.

Mr. *Rolt* and Mr. *A. Smith* for the Plaintiffs.

Mr. *Bacon* and Mr. *Hardy* for the Defendants.

In addition to the cases adverted to in the judgment, *Perry v. Truefitt* (a) and *Pidding v. How* (b) were cited.

Judgment.

VICE-CHANCELLOR:—

This case is one in which the injunction must be granted, although not to the extent asked. The principles to be

(a) 6 Beav. 66.

(b) 8 Sim. 477.



applied in cases like the present are laid down by Lord *Langdale* in *Croft v. Day* (a), and I may adopt his words. Lord *Langdale* says, "It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud, it is necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by preserving his own individuality" (b). Then speaking of the labels which were there in question, he says, "It is truly said, that, if any one takes upon himself to study these two labels, he will find several marks of distinction. On the other hand, the colours are of the same nature, the labels are exactly of the same size, the letters are arranged in precisely the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me, that there is quite sufficient to mislead the ordinary run of persons, and that the object of the Defendant is to persuade the public that this new establishment is in some way or other connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½, *Holborn Hill*, and not to 97, *High Holborn*" (c). In the present case, the labels on the packets of pins sold by the Defendants bear on the top the title "Her Majesty's Letters

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(a) 7 Beav. 85.

(b) Id. 88, 89.

(c) Id. 89.

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Patent." The embellishments of the label are of the same character, and they are arranged in the same form and printed in the same Gothic type as the labels of the Plaintiffs. The same colours are moreover used, and there is a similar scroll or border. To the general eye, therefore, they resemble the Plaintiffs' labels, although upon a minute examination differences may be detected. I agree with the argument on the part of the Defendants, there must be an intention to deceive the public, or this Court will not interfere. That was established in *Sykes v. Sykes* (a), which was followed by the case of *Crawshaw v. Thompson* (b); and in this case the Defendants have not denied, in a satisfactory way, that they intended such a deception. The charge in this bill is, that they had made up pins for sale in sheets of paper of a colour and with labels in imitation of those of the Plaintiffs', "and the Defendants have so done for the purpose of passing off and enabling others to pass off the pins manufactured by the Defendants for the pins of the Plaintiffs." The Defendants, in their affidavits, traverse this charge in its whole length in one allegation. They say: "We deny that we have fraudulently made up such pins for sale in sheets of paper of the same colour as the sheets sold by the Plaintiffs, and impressed with labels or stamps in the same colour, and made in imitation of and closely resembling the labels so, as aforesaid, used by the Plaintiffs; and that the Defendants have so done for the purpose of passing off and enabling others to pass off the pins manufactured by the Defendants for the pins of the Plaintiffs." Every branch of the sentence is here coupled with the conjunction "and," leaving it consistent with the terms of the affidavits, that there might have been the intention to deceive the public which the complaint of the Plaintiffs supposed. Looking to the evident care with which the affidavits are framed, I think that this

(a) 3 B. & C. 541.

(b) 4 Man. & Gr. 357.

is not a satisfactory denial of the charge in the bill. I do not say, however, that, if the allegation of the fraudulent intention of the Defendants had been more distinctly negatived, the Court would have been concluded by the effect of that denial. It is impossible to look into the minds of the defendants, or to detect their secret motives. The question rather is, whether their acts were such as were likely to mislead the public. It is, I think, enough to say, that, considering all the points of resemblance between the sheets and labels of the Plaintiffs' and the Defendants' in character, colour, and otherwise, a jury would be bound to assume that it had not been the result of a fortuitous occurrence of events, but had arisen from design. I am of opinion that the design of the Defendants must be taken to be, so to frame the sheets and labels that an unwary purchaser might be deceived and led to mistake one for the other.

1853.
 EDDELSTEN
 v.
 VICK.
 Judgment.

It has been argued, that the name of "*Tayler's* Solid Headed Pins," was only used as a description of the article; and that, if an article has acquired a particular name, the Court will not restrain the use of the name by any person entitled to make and sell the article. No doubt, in a fair case, there being no property in a mere name, it may be open to the use of all persons dealing in the article which it describes. Thus, a maker of pins of this description may say, "I, *John Smith*, manufacture and sell *Tayler's* Solid Headed Pins;" and the Court would not in such a case grant an injunction to restrain the use of that name. It was said, that when a patent expired it was open to the public at large to adopt the description of the article by which it had become known to the world, and to use the label by which the articles made by the Plaintiffs had been theretofore distinguished. It does not, however, follow, because, upon the expiration of the patent the article and its known description became open to all, that therefore all would become entitled to use the label by which the paten-

1853.
 EDWARDS
 v.
 VICK.
 Judgment.

tees had been accustomed to distinguish their goods. The public may have acquired confidence in that particular label, and that confidence may have given a value to it which the patentees may be entitled to have protected after the expiration of their patent.

It was contended that the Plaintiffs were not the patentees, and that they had no title to the label; but it is not the patent, but the continuous use of the label for a certain period of time, which confers the right to protection; and the length of time during which this use by the Plaintiffs and those to whose rights they have succeeded existed, is a sufficient title.

It has also been contended, that the Plaintiffs, by describing their manufacture as a patented article, without any explanation that the exclusive privilege of the patent had expired, were guilty of a misrepresentation, and did not therefore come into Court with clean hands, or put forward a right which the Court would respect. I am particularly anxious that it should be understood, that all persons applying to this Court for its extraordinary interposition by way of injunction, should shew that they themselves have not been guilty of fraud or misrepresentation; and that, if they have made any representations to the public, they must shew that such representations have not been made without foundation or with any fraudulent intention. If, therefore, in this case, there had never been any patent granted for the manufacture of these pins, or if after the term of the patent had expired the Plaintiffs had taken up the use of the term "patented," as descriptive of their manufacture, and had first circulated the labels in that form, I should probably have thought that the case came within this ground of objection to the interference of the Court. But here that was not so; the blocks for the labels had been made during the existence of the patent, when the

representation was perfectly true. The Plaintiffs became the proprietors of the rights of the original patentees, and of the blocks, labels, and other property; and those labels, which, as the external demonstration of the article, had acquired a certain value or had attracted a certain degree of confidence, they continued to use. It is no doubt to be much preferred, that no representation should be issued to the public which is not strictly true; but in a case in which the goods have become known by a description which was originally accurate in every part, if I were to hold that the continued use of this description disentitled the party to the assistance of the Court, it would be going much farther than I did in refusing to interfere by injunction where the Plaintiff had adopted and used the word "patent" untruly and without foundation (a).

1853.
 EDELSTEIN
 v.
 VICK.
 Judgment.

With regard to the argument of the Defendants that the injunction would be an injury to their business, the answer is that that will not be so, if their case be true. If on the contrary they allege that it will be an injury or impediment to the sale of their goods, if they are restrained from using the Plaintiffs' wrappers, it appears to me that they confess the whole case.

The Court granted an injunction restraining the Defendants from using labels containing any inscription intending or appearing to designate the pins manufactured by the Defendants as being made by *D. F. Tayler & Co.*, or by the Plaintiffs.

(a) See *Flavel v. Harrison*, 10 Hare, 467.

1853.

Feb. 25th.

PATERSON v. MURPHY.

A lady, who had lent a sum of money on an equitable mortgage by a deposit of title deeds, signed a memorandum accompanying the deposit, which expressed that the mortgagor should pay off the mortgage debt by certain quarterly instalments, and after paying a specified amount to the mortgagee, should invest the remaining instalments in Consols for the benefit of the children of A. The mortgagee subsequently signed another memorandum, directing the mortgagor to continue to pay the instalments of the debt to her, and not invest them in Consols as before directed. Both

of these documents were made in the handwriting of the mortgagor, under the direction of the mortgagee, and the mortgagor thereby had notice of them; and it was held in suit for the administration of the estate of the mortgagee, that, by the effect of the memorandum and the notice thereof to the mortgagor, he became a trustee for the children of A. of the monies directed to be invested in Consols; and that the first memorandum constituted a voluntary declaration of trust, which the mortgagee could not revoke, the benefit of which the children of A. were entitled to against the next of kin of the mortgagee.

PATERSON, being about to build some houses, borrowed 300*l.* of the testatrix in the cause, and deposited with her the title deeds of the site, by way of security, accompanied by a memorandum, in his own handwriting, and which was prepared under her direction; by which it was expressed that *Paterson* was to pay the testatrix 10*l.* a quarter from Christmas, 1847, until the sum of 70*l.* should be paid; then he was then to invest 10*l.* a quarter in Consols, until the sum should be invested; and after the decease of the testatrix he should transfer the 200*l.* Consols, and pay the dividend to the children of *J. P. Murphy*, and *Eleanor*, his wife, in equal shares, when the youngest attained twenty-one years; if any of such children should die before the youngest should attain twenty-one, then the share of the one so deceased should be divided among the children of *Eleanor Murphy* as and when they attained twenty-one years. This memorandum, although written by *Paterson*, was not signed by him; but it was signed by the testatrix. Subsequently, after some portion of the 70*l.* had been paid, but before any investment in Consols was made, another memorandum was drawn up, also in the handwriting of *Paterson*, and signed by the testatrix, in the following words:—"I wish you to make the investment in Consols, nor to pay the same to the children of *Eleanor Murphy*, but to continue the investment to me." *Paterson* thenceforward continued to

the payments to the testatrix, on the footing of the latter memorandum. After her decease, the children of *J. P. Murphy* and *Eleanor Murphy* claimed the 200*l.* Consols, and the dividends which would have accrued thereon if the investment had been made, on the ground that the first memorandum amounted to a settlement and declaration of trust of the fund, of which *Paterson*, the trustee, had notice; that by the effect of such notice he became a trustee for them, notwithstanding that the creation of the trust had not been communicated to them until after the second memorandum had been made; and that, under such circumstances, the testatrix had not reserved to herself the power of revoking the trust which the first document had created.

1853.
PATERSON
v.
MURPHY.
Statement.

The question was argued on the petition of the children claiming as cestuis que trust, presented in a suit for the administration of the estate of the testatrix.

Mr. *Terrell*, for the petitioners, cited *Bill v. Cureton* (a), *Smith v. Lyne* (b), *Kekewich v. Manning* (c), *Moore v. Darton* (d), *Exton v. Scott* (e), *Fletcher v. Fletcher* (f), and *M'Fadden v. Jenkyns* (g).

Argument.

Mr. *Smythe*, for the next of kin of the testatrix, cited *Hughes v. Stubbs* (h), and *Dillon v. Coppin* (i).

The cases of *Garrod v. Lord Lauderdale* (k), and *Wallwyn v. Coutts* (l), were also referred to in the argument.

Mr. *Cracknell*, for *Paterson*, the trustee.

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| (a) 2 My. & K. 503. | (g) 1 Hare, 458; S. C., 1 Ph. 153. |
| (b) 2 Y. & C. C. C. 345. | (h) 1 Hare, 476. |
| (c) 1 De G., Mac., & G. 176. | (i) 4 My. & Cr. 647. |
| (d) 4 De G. & S. 517. | (k) 2 Russ. & My. 541. |
| (e) 6 Sim. 31. | (l) 3 Mer. 707. |
| (f) 4 Hare, 67. | |

1853.

PATERSON

v.

MURPHY.

Judgment.

VICE-CHANCELLOR:—

I think I am bound to hold, that there has in this case been a complete declaration of trust of the fund in question on the part of this lady. There appears to be everything necessary to render the declaration binding and complete. There was at the time of the memorandum an existing fund, which consisted of a debt due from *Paterson*. It was therefore necessary that *Paterson* should have notice of the trust which the settlor created, and that notice is shewn to have been given by the fact, that the memorandum was drawn up by *Paterson* himself. The document is signed by the lady, and it expresses what is to be done with the fund after her decease. It is to be given beneficially among certain children, when the youngest has attained twenty-one, and if none attain twenty-one, then over. This being the transaction which takes place, I have to consider whether it does or does not amount to a complete declaration of trust, or whether it can be assimilated to the case of one who, for his own benefit, passes over his property, or a portion of it, to an agent, to be distributed by the agent amongst his creditors or others. In order to bring the transaction within the principle applicable to the latter class of cases, it must be viewed merely as an arrangement, whereby the property is to be disposed of for the benefit of the lady herself, and which arrangement it was open to her to alter or discontinue at her pleasure. I am not aware of any authority for carrying the principle of the cases of *Walwyn v. Coutts* (a), and *Garrod v. Lord Lauderdale* (b), farther than to arrangements for the payment of creditors. I do not know that that doctrine has ever been applied as between the settlor and persons who are purely the objects of his bounty, the former having appointed an agent to administer the bounty, and declared for whom it was intended. In the case of a voluntary declaration, the obvious inference is, that it

(a) 3 Mer. 707.

(b) 2 Russ. & My. 451.

is made for the benefit of the persons in whom the maker of the declaration means thereby for the first time to create an interest in the property to which it relates. A provision for payment of the debts of the party making the declaration is wholly different in its nature. The trustee of the property of the settlor, which is directed to be applied in payment of debts, may be regarded as standing in the position of a steward or agent of the debtor, whose duty it is to satisfy the debts, according to the directions which he may receive, and hand over the balance to his principal. I am not aware that a declaration, made in favour of persons who are purely volunteers, has ever been held to constitute merely an agency for the exclusive purposes of the settlor. Nor do I know of any case in which, in order to establish a voluntary trust, it has been held necessary that the cestuis que trust should be informed of its creation or existence—whether the effect of the transaction be to pass the trust property to the trustee, or to declare an interest in property previously vested in him. *Moore v. Darton* (a) seems to be very nearly the present case, although there are some distinctions between the cases. The document in that case was signed by the trustee, and was actually handed over to the person benefited, by the testatrix in her lifetime; so that, in fact, the question of a donatio mortis causâ would have been raised, if the Vice-Chancellor had not held that it was precluded by the fact that the circumstances constituted a complete declaration of trust inter vivos. In *Keke-wich v. Manning* (b), and in other cases of the same description, the only question has been, whether the settlor meant to declare or pass an interest to certain cestuis que trustent, in property which had been placed in particular hands. I was referred to the case of *Hughes v. Stubbs* (c); but that was the case of a verbal communication. It may be doubtful whether the Court would hold that a voluntary

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PATERSON
v.
MURPHY.
Judgment.

(a) 4 De G. & S. 517. (b) 1 De G., Mac. & G. 176. (c) 1 Hare, 476.

1852.
 —————
PATERNOS
 v.
METZEL.
 —————
Judgment.

trust could be created by merely oral expression: so much might depend on a correct report of the words. If, as part of a verbal communication by a supposed settlor, he had used words of this sort, "I propose to do so and so," or, "It is my present intention" to do it, the effect might be to shew that he had not at the time absolutely determined to create the trust; and in such a case, I can well imagine that the Court would require extremely strong evidence before it would say that an irrevocable trust was created. In *Hughes v. Stubbs*, the lady gave an order to *Cropper* for a sum of 150*l.*, and at the same time gave him verbal directions to apply the money to make up the difference in value of the 100*l.* legacy given in the will, and the value of a share of 100*l.* stock in the *London and Birmingham* Railway Company at the time when such legacy should be payable, thinking it unnecessary to alter her will. The meaning of the testatrix no doubt was, as Vice-Chancellor *Wigram* held, that the money should be a testamentary appropriation, and not a present declaration of trust, and that she wished to retain the same power over that sum as over what she had given by her will.

In this case the lady has caused to be reduced into writing, and has signed, a clear and distinct statement of what she wishes to be done with the trust fund; and I cannot see what this can amount to less than a declaration of trust, and there is no power of revocation reserved by the document. I must, therefore, declare the children entitled.

1853.

HAYNES v. FORSHAW.

April 19th &
20th;
May 7th.

THE testator by his will dated in 1833, directed his debts to be paid, and devised his *Everton* estate (which was partly leasehold) to his wife for her life; and subject to her life interest, he directed that it should sink into and become part of his residuary estate; and after directing his executors to settle at their discretion, with all convenient speed, the affairs of a partnership in which he was engaged, he authorised and empowered them, or any or either of them who should qualify to that his will, at any time that they, or any or either of them, should in their or his discretion think proper, and notwithstanding the minority of his children, to sell all his personal and real estate, or any part thereof, of which he was seised and possessed or interested in, both in his individual and sole right, and in his right as one of the partners of the firm in his will mentioned; and he empowered his said executors, or any or either of them as aforesaid, to execute sufficient deeds of conveyance of the same to the purchaser or purchasers thereof; and he declared

A testator charged his debts and legacies upon his estate generally, and devised and bequeathed the residue to his six sons as tenants in common, giving his executors powers of sale. One of the sons, who was the only acting executor, was in partnership with another person, and paid debts of the testator, with monies advanced by the partnership; he also purchased the residuary shares of several of his brothers; and he

borrowed money from the Plaintiff, and deposited with him the title deeds of real and leasehold estates of the testator, by way of security for the same, with a note undertaking to make over such property to the Plaintiff when required. The partnership became bankrupt, and a deed was made conveying the residuary estate of the testator to trustees upon trust, among other things, to repay to the assignees of the bankrupts the advances made to the executor by the firm:—*Held*, in the circumstances of the case, that the contract for security between the Plaintiff and the executor was not for an equitable mortgage of the testator's estate comprised in the deposited deeds, under the powers given to the executors by the will, but was a contract for an equitable mortgage of no more than the beneficial interest of the executor therein.

That although debts of the testator had been paid by means of the advances made by the partnership to the executor, and although the assignees of the bankrupts might possibly be entitled to stand in the places of the creditors so paid as against property still remaining in the hands of the executor, they could not so stand in the places of such creditors as to possess the rights which those creditors originally had, of following the property of the testator which had been aliened by the executor for his own purposes or benefit.

That the Plaintiff was entitled to have the estate of the testator marshalled, so that the subsisting debts and charges thereon might be thrown in the first place on the residuary estate of the testator, not comprised in the original mortgage.

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 HATFIELD
 v.
 FORESLAW.
 —
Statement.

that it was his will that the moneys arising by the sale thereof should be placed out at interest by his said executors, or any or either of them, on government or real security, to answer the purposes of that his will; and he empowered his said executors, upon payment of the money arising from the sale of all or any part of his said personal or real estate, to sign and give proper receipts for the same; and after giving certain legacies he bequeathed to each of his children living at his decease the sum of 5000*l.*, to be paid to each child when and so soon as he or she should attain twenty-one or marry; and he charged all his estate with the payment of an annuity to his wife and the said legacies to his children, and for the maintenance and education of his children; and he gave and devised the residue of his real and personal estate unto such of his sons as should be living at the time of his decease, to be equally divided between them when and as soon as his said sons should attain the age of twenty-one years; and he appointed his son *Jonathan Higgenson*, and others, executors of his will. The testator died in 1834, leaving his widow, his said son *Jonathan*, and seven other children (five of whom were sons) surviving him. The will was proved in 1835 by *Jonathan Higgenson* alone.

In August, 1843, the Plaintiff, who was the uncle of *Jonathan Higgenson*, lent him a sum of 3000*l.*, and in the year 1844, a further sum of 3400*l.* Previous to this time *Jonathan Higgenson* had become the purchaser of the shares of four of his brothers in the residuary estate of the testator, and had thereby become entitled to five-sixths of the *Everton* estate. One of the sons of the testator was still a minor. In 1845, the Plaintiff, being (as he stated in his bill) about to leave *Liverpool*, applied to *Jonathan Higgenson* for security, and the latter thereupon gave the Plaintiff a promissory note for 7000*l.* and deposited with him the title-deeds of the *Everton* estate devised by the

testator's will, accompanied by a memorandum as follows, dated the 11th of June, 1845:—"My dear uncle,—Enclosed I hand you a note of hand for 7000*l.*, and herewith you have the deeds of the houses and lands in *Everton-terrace*, which property I hereby undertake to make over to you whenever required by you, or to pay the said note of hand when you will return the deeds which you hold as security for the payment of the said note.—List of deeds you have herewith.—The 6400*l.* already received. We have arranged the interest to the 4th of June, the date of note, and the remaining 600*l.* you can let me have at your convenience. Interest at four-and-a-half per cent. payable half-yearly." The remaining 600*l.* was never advanced. *Jonathan Higginson* became bankrupt in November, 1847, up to which date he paid the interest on the 6400*l.*

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HAYNES
v.
FORSHAW.
Statement.

By a deed, dated in June, 1850 (to which the Plaintiff was not a party), all the estate and effects of the testator were assigned to the Defendants *H. and J. Forshaw*, upon trust to pay all debts which were or should thereafter be established against the estate of the testator; to pay his widow 7000*l.*, in lieu and discharge of her life interest and annuity, and other claims on his estate; to pay the remaining legacies to his daughters and son, and two sums of 12,000*l.* and 14,000*l.* to the assignees in bankruptcy of *Jonathan Higginson* and his partner, such sums and interest to be paid in the order therein mentioned,—the same sums of 12,000*l.* and 14,000*l.* being in satisfaction of the monies advanced by the firm to the testator's estate; and subject to such payments, to divide the residue into six equal parts, and pay five-sixths to the assignees in the bankruptcy, and one-sixth to the son, whose share was unsatisfied.

The Plaintiff by his bill sought to enforce the charge created by the deposit of the title-deeds of the *Everton*

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 HAYES
 v.
 FOREMAN.
 Statement.

property, in June, 1845, as an equitable mortgage of the entirety of that estate; or if not as at least an equitable mortgage of the whole interest, original and acquired, of *Jonathan Higgenson*, therein; and in the latter case the Plaintiff claimed to have the estate of the testator marshalled, so that his debts and legacies might be satisfied out of the other parts of the estate not subject to the plaintiff's mortgage.

The parties went into evidence, by which it appeared that debts of the testator, to a large amount, were outstanding at the time the advances in question were made by the plaintiff to *Jonathan Higgenson*; and *Jonathan Higgenson* stated that he applied to the Plaintiff for the loan, for the purpose of liquidating a legacy due to one of his brothers, under the will of the testator. The Plaintiff, with reference to the loan, in answer to the third interrogatory, after stating the sum which he had advanced to *Jonathan Higgenson*, proceeded thus:—

“I was to receive interest for the sum advanced at the rate of four-and-a-half per cent., and to hold the deeds of the *Everton* properties, part of the estate of the late *John Higgenson, Esq.*, as a security. My reason for taking these deeds as a security was the knowledge that *Mr. Jonathan Higgenson* had settled with four of his brothers for their shares of that property under their father's will, and that he himself was entitled to one-sixth part of the same under the will.”

Argument.

Mr. Wigram and *Mr. C. Hall* for the Plaintiff.

Mr. Rolt and *Mr. Selwyn*, for the assignees in bankruptcy of *Jonathan Higgenson* and his partner, contended, that, in respect of the debts and charges on the estate which had been paid off by means of advances from the firm, they

were entitled to stand in the place of the creditors who had been so paid as against the whole of the estate of the testator, in priority to any alienee whose title depended merely on the interest which the executor could confer in his own right, and who was not entitled to claim as a purchaser of the testator's estate.

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FORSHAW.
Argument.

Mr. *Bacon* and Mr. *Dickenson* for the parties claiming under the deed of June, 1850, insisted that they were entitled to the benefit of the legal estate in the leasehold portion of the property, as purchasers, without notice of any claim by the Plaintiff; and that the person in whom the legal estate of the copyhold was vested, was a trustee for the same parties, as having acquired an interest without notice prior to the claim of the Plaintiff.

The following cases were cited:—*Tylden v. Hyde* (a) *Ball v. Harris* (b), *Forbes v. Peacock* (c), *Stronghill v. Anstey* (d), *Miles v. Durnford* (e), *Cole v. Muddle* (f), *Pannell v. Hurley* (g), *Page v. Adam* (h), and *Gosling v. Carter* (i).

VICE-CHANCELLOR :—

After stating the advances of 6400*l.* made by the Plaintiff to *Jonathan Higgenson*, the sole acting executor of *John Higgenson* the testator, the deposit of the title deeds of the *Everton* estate, and the note or memorandum of the 11th of June, 1845 (k), proceeded—

Judgment.

There is no doubt that the deeds were deposited as a

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| (a) 2 S. & S. 238. | (f) 10 Hare, 186. |
| (b) 4 My. & Cr. 264. | (g) 2 Coll. 241. |
| (c) 1 Ph. 717. | (h) 4 Beav. 269. |
| (d) 1 De G., Mac., & G. 635. | (i) 1 Coll. 644. |
| (e) 2 Sim. N. S. 234. | (k) Supra, p. 95. |

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 —
Judgment.

security for the 6400*l.* and interest, and the principal question is, whether the deposit was made in such a manner as to create an effectual security on the *Everton* estate, or only on the interest of *Jonathan Higgenson* in that estate.

The *Everton* property, which consisted partly of copyhold and partly of leasehold estate, formed a part of the property devised by the will of *John Higgenson*, the father, and, subject to an estate created for the benefit of his widow during her life or widowhood, was directed to fall into his residuary estate. The residuary estate was given to the six sons of the testator in equal shares as tenants in common, and the debts of the testator and his legacies of 5000*l.* a piece to his children were charged on the whole of his property. There is no question, that, by the terms of the will, *Jonathan Higgenson*, as the acting executor, had power to deal with the property for the payment of the testator's debts, so as to relieve purchasers from the necessity of seeing to the application of the purchase monies; and the only question with regard to the transaction now before the Court is, whether the contract with the Plaintiff was in fact a contract for the mortgage of the whole of the *Everton* estate, or only of the interest of the acting executor therein. *Jonathan Higgenson*, the executor, had bought up the interests of four of his brothers in the residuary estate, and was therefore the owner of five-sixths of the property in question; and whilst on the one hand it is contended that the loan was made either without any specific security, or, if any, at the utmost upon the security of the beneficial interest of the executor, on the other hand it is argued that the intention of the executor was to charge the interest of the testator in the estate as well as his own.

The principle upon which cases like these turn is very

plain." As to charges made by an executor, or one having power to dispose of real estate, where the purchaser is not bound to see to the application of the money, the law is well settled. If the executor or trustee be dealing for an advance of monies, and that advance is made by a third party to the executor or person having control over such real estate, in such a manner as that there is no reason to infer that the contract with the executor, or other person having that authority over real estate, is for his own benefit, then the person advancing the money is entirely discharged from seeing to its application, and takes the estate free from any liability in respect of the money so advanced. But if, on the other hand, the security be made for the private debt of the executor, or for an advance made, not for the purposes of the will, but to the executor or other party on his own account or for his own benefit, then the party making the advance takes subject to all the trusts affecting the same under the will. In *Watkins v. Cheek* (a), Sir John Leach holds, that there is no difference in the application of the principle between the case of one who deals with an executor, for leaseholds, and with a person having power over freeholds, for the freeholds. In this case, the property was partly freehold, partly leasehold. It is therefore necessary to examine how far in the particular circumstances of this transaction it appears that the Plaintiff was dealing with *Jonathan Higgenson* as representing the testator's estate, or as obtaining an advance of monies on his own account. The case is singularly put in the bill, and more singularly in the evidence of the Plaintiff himself, who has been called as a witness. On the bill it is stated, that, before August, 1843, *Jonathan Higgenson*, the son, applied to the Plaintiff, a Liverpool merchant, for a loan of 7000*l.* at four-and-a-half per cent., and proposed as a security to give a mortgage upon an estate at *Everton*, part of an

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HAYNES
v.
FORSYTH.
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(a) 2 S. & S. 199.

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 HUTTON
 v.
 FARRAR.
 Judgment.

estate devised by *John Higginson* his late father, which estate was partly copyhold and partly leasehold, and which was the Plaintiff agreed to make. The proposal to make to the Plaintiff a mortgage of the "estate," would, *prima facie*, mean the whole estate; but it is to be remembered that *Jonathan Higginson* held five-sixths of this estate beneficially in his own right, subject to the life estate of his mother during her widowhood. The bill then says, "that, in pursuance and part performance of this agreement, the Plaintiff, in August, 1843, lent and advanced to *Jonathan Higginson* the sum of 3000*l*." Nothing, however, was done with respect to the proposed mortgage for the succeeding two years. The bill states that subsequently the Plaintiff advanced to *Jonathan Higginson* the further sum of 3400*l*. in pursuance of the aforesaid agreement. It appears that the Plaintiff left the transaction in that state until *Jonathan Higginson* was about to leave *Liverpool*, when he asks for a security for the sum of 6400*l*. and interest. He does not say that he asked for the security agreed upon,—he goes on from 1843 to 1845, without any security at all, and then, when the debtor is about to leave the neighbourhood, he says, 'I wish you to give me some security.' That would have been answered by security of any description, by personal security; or certainly by property belonging to the executor, as well as property which he held as representing the testator's estate. It is then stated that *Jonathan Higginson*, on the 11th of June, 1845, made and delivered to the Plaintiff his promissory note for 7000*l*., and that together with the deeds he delivered the memorandum in writing of that date to which I have referred (a). In this memorandum nothing is stated as to the devise of the estate by the testator to *Jonathan Higginson*, or that he had any view of passing the whole property according to the power which he possessed under the

(a) *Supra*, p. 95.

testator's will. It should be observed, that this advance was made about nine years after the death of the testator, but at a time when it appears that there were large debts of the testator still outstanding. Then comes the transaction of 1845, when the Plaintiff says he called for security, not referring to the original contract. How is this transaction represented in the Plaintiff's own depositions? These depositions are sworn after the answers were filed, and the issue challenging the claim had been raised. If in the contract for the security there had been any reference to the testator's estate, nothing could be clearer than that it was the Plaintiff's interest and duty to state it; but from what the Plaintiff says with regard to this transaction, I cannot entertain any doubt that he advanced the money in question without being told that it was required for the purposes of the testator's estate. The Plaintiff distinctly states in his depositions that he took the security owing to his knowledge of the interest which the executor had acquired in his brother's shares of the estate. [His Honor read the Plaintiff's deposition in answer to the third interrogatory, *supra*, p. 96.] It is, I conceive, very creditable to the Plaintiff that he has made this plain and fair statement of his own case, which clearly shews that he took the security because he knew of the interest of *Jonathan Higginson* in the estate, and does not state that he in any respect looked to his powers as representing the testator.

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The authorities on the effect of dealings with an executor are discussed at great length by Lord *Eldon* in *M'Leod v. Drummond* (a). In that case Sir *W. Grant* had thought it desirable to direct an inquiry into the circumstances under which the advances were made to the executors, and one memorandum was produced by which the two executors, *Ross* and *Ogilvie*, undertook to assign the bond as from them-

(a) 17 Ves. 152.

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 —
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selves, and also as executors 'a'. Lord *Eldon*, commenting on the transaction, says, "One circumstance has great weight with me; that this is not a case of executors applying property in their hands and raising money upon a deposit or sale of that property, in which case it may be said public convenience requires that they should be supposed to receive it for the purpose to which they ought to apply it; but two individuals, each happening to be executor, but also carrying on business in *London* under the known firm of *Ross & Ogilvie*, apply to these bankers for money; not to be in their hands probably, or by interment for the uses of the will, neither of them appearing to be dealing as executors" (b). Lord *Eldon*, apparently, does not consider the terms of the memorandum as expressing that they were acting in their character of executors. In another part of his judgment he remarks on the difference between taking a security for a present advance or for an antecedent debt; but he adds, "admitting, however, that the bankers had no other motive for the advance upon such a deposit than they generally have, if it appears in the transaction itself that the borrower is about to apply the money so raised on the testator's property to objects with which his affairs have no connection, I should hesitate to say, that, as the temptation was so slight, the Court would not examine whether that was not a most inequitable transaction with reference to the persons entitled to that property" (c). In that case Lord *Eldon* held that the pledge was one that could not be made good of itself; but on the ground of lapse of time and other circumstances, he dismissed the bill, holding that the co-executors were not in a position to recover the property which had been pledged. In *Hill v. Simpson* (d), Sir *W. Grant* put his decision on the ground that the party dealing with the executor did not in truth

(a) 14 Ves. 356.

(b) 17 Ves. 159.

(c) Id. 170.

(d) 7 Ves. 152.

rely on his being clothed with that character, but on certain representations made by him which they chose to receive without question, and which the smallest examination would have proved to be false. He observes, after discussing the question as to the exercise of the powers of executors,—“Hitherto I have supposed the executor pretending no other authority than as executor; and that the other Defendants relied solely upon his authority in that character; but the truth is, it was not upon his legal authority as executor that they relied; but they proceeded as they state upon the faith of his representation, by which they were induced to believe, that the property he assigned to them was actually his own” (a).

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In the present case it is clear that the Plaintiff relied on the beneficial interest of the borrower. It is true, as it was suggested, that the Plaintiff may be said to have looked on it as an additional security,—knowing the number of pitfalls the law throws in the way of these dealings; but I do not think, under all the circumstances, I can possibly hold that that transaction was not what the Plaintiff represents it to be,—a deposit of deeds to the extent of giving all the interest of the depositor in his own right, instead of a contract founded upon the security of the testator's estate.

Another question then arises. It appears that *Jonathan Higginson* had a very large interest in or claim on the estate of the testator, in respect of debts which had been paid off by him; and in the course of paying off which debts he had obtained large sums of money from the firm in which he was a partner; and it appears also, that there are still legacies and other unsatisfied charges on the property. It is suggested that these legacies, and the beneficial interest of *Jonathan Higginson* in his own residuary share, and as

(a) 7 Ves. 169.

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representing other residuary legatees, must be subordinate to the right to recover, in the first place, the monies paid in discharge of the testator's debts. If it be held, as I have concluded, that the Plaintiff's charge is not upon the whole estate, but only upon the five-sixths in which *Jonathan Higgenson* was beneficially interested, and which forms part of the residue, then the assignees of the bankrupts, claiming under the deed of June, 1850, contend that they are entitled to follow the whole residuary estate of the testator, and to be reimbursed the advances made to *Jonathan Higgenson*, the executor, by the firm, and for the payment of which advances that deed provides. They say, "We have made large advances to you in respect of debts of the testator, which have by these means been paid off. These debts were originally good charges on the estate, and we have now a right to have such advances satisfied out of all or any part of the estate which was liable to such charges." In support of this claim, the case of *Ashby v. Ashby* (a) was cited, and a passage in *Williams on Executors* (b) referring to it. In which case the Court intimated an opinion, that where a party has advanced money to an executor, for the purpose of paying a debt of the testator, he may have a right to obtain a judgment *de bonis testatoris* but not to charge the executor personally. I am not aware that there is any existing decision which goes that length; although there is no doubt, that, if there be a fund in Court belonging to the estate of a testator, and the executor has paid a debt due from the estate, he has been allowed to say, place me in the position of the creditor who has been thus paid; and perhaps, although I do not find such a case, a third party having for any sufficient cause discharged a debt, might be permitted to stand in the position of the creditor as against the fund, or against devisees and other persons taking under the will: but I know of no case in which,—

(a) 7 B. & C. 444.

(b) Vol. 2, pp. 1509, 1510, 4th edit.

a devisee having aliened the devised estate, a party who has paid off a debt of the testator could by that means affect the aliened estate with a trust, and keep the debt alive against the alienee. If that were so, the position of a person so paying off the debt of a testator would be better than that of a mortgagee; for if a third party should pay off a mortgage on the estate of another and take no assignment of the mortgage debt, he would acquire no charge on the mortgaged premises in respect of the debt which he had so satisfied.

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—
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Here, however, the case is rather different from that which I have supposed; for it is not the case of a person himself paying off the debt of the testator, but paying money to the executor generally and giving credit to him, by placing money in his hands to enable him to pay off a debt. It was said by Mr. *Rolt* that here the firm acted as executors; but it cannot I think be put higher than an advance to the executor,—it was carried to his debit in the books of the firm, and there can be no doubt that the executor would be personally liable. According to the opinion intimated in *Ashby v. Ashby*, if you advance money to an executor generally for the purposes of the estate, he having property of the testator's in his hands, you can lay hold of it; but if he, happening to be the owner as well as executor, aliens part of that property, it is surely going too far to say that you can follow that property in the hands of the purchaser, and recover out of it the extent of your advance. I know of no case or dictum which goes that length; although, if the property had still remained in the hands of the executor, it might, perhaps, in such a case have been recovered.

The Plaintiff claims to have the estate marshalled, and there must be an inquiry what legacies and charges affect the property comprised in his security, and a declaration

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that the Plaintiff is entitled to have such legacies and charges thrown in the first place upon the estate of the testator other than the *Everton* property, comprised in his equitable mortgage.

April 25th.

SHEARMAN v. MCGREGOR.

Where a policy of life insurance had been effected, as part of a family arrangement, to secure to the wife and children of the insured a sum of money, and the husband, in breach of the condition of a bond which he had executed, omitted on one occasion to pay the premium on the policy, whereby the insurance dropped, but afterwards revived it; the Court, —under the circumstances, and being of opinion, that the manner in which the object and intention of the insurance and the bond had been described to the husband in a correspondence on the subject, had misled him, and that he was mistaken as to the consequences of the omission to pay the premium,—restrained an action on the bond in respect of such breach, upon the terms of the husband paying the costs.

THE bill was brought by the Plaintiffs *William Shearman* and *Annie* his wife, to restrain an action upon a bond, brought against the Plaintiff *William Shearman* by the Defendant *McGregor*. The Plaintiff had become liable to be sued upon the bond, in consequence of omitting to pay the premiums upon a policy of insurance for his life, whereby the policy had become void; but he had been afterwards allowed by the insurance office to pay the premium, and the policy had been revived before the institution of this suit.

The Plaintiff, *William Shearman*, paymaster in a regiment of the line, had been desirous of exchanging into a cavalry regiment; and in order to effect this object a *Mrs Putland*, an aunt of the Plaintiff *Annie*, his wife, gave her 1250*l*. The intention of the aunt was to settle this sum for the benefit of the niece and her children, and the mode adopted for that purpose was the execution by the Plaintiff *William* of a bond and indenture, both dated the 26th of November, 1851.

By the bond, the Plaintiff *William* was expressed to be bound to the Defendant in the penal sum of 2500*l*., with

the condition that if he (the Plaintiff), his heirs, executors, or administrators "should well and truly pay or cause to be paid unto the said *Alexander M'Gregor*, his executors, administrators, or assigns, the just and full sum of 1250*l.* sterling on the 26th day of May next ensuing the date of these presents, or shall and will well and truly perform and keep all and singular the covenants, clauses, and agreements contained in a certain deed, bearing equal date with these presents, and made between the said *William Shearman* of the first part, *Anna Dorothea Putland* of the second part, and *Alexander M'Gregor* of the third part, without fraud or further delay, then the above obligation to be void and of none effect, or else to stand and remain in full force and virtue in law." The indenture was made between the Plaintiff *William Shearman* of the first part, *Mrs. Putland* of the second part, and *A. M'Gregor*, the Defendant, of the third part; and the same, after reciting the policy of assurance, and that the Plaintiff *William Shearman* was married to the said *Annie Shearman*, proceeded as follows:—"And the said *William Shearman*, being in want of a sum of 1250*l.* for the purpose of his promotion in the army, hath applied to the said *Anna Dorothea Putland* to lend and advance to him the said sum upon the security of the said recited policy of assurance and his bond and warrant of attorney for confessing judgment thereon, to which the said *Anna Dorothea Putland*, in consideration of the natural love and affection which she bears towards the said *Annie Shearman*, hath consented and agreed, upon the terms of having the said sum secured to the said *Alexander M'Gregor* upon the trusts of this indenture; and by the indenture, after reciting the bond, it is witnessed, that, "in pursuance of the said agreement, and in consideration of 1250*l.* to the said *William Shearman* paid by the said *Anna Dorothea Putland*, the said *William Shearman*, by the consent and direction of the said *Anna Dorothea Putland*, assigned all that instrument or policy of assur-

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 —
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and so effected by him with the said Medical, Invalid, and General Assurance Company, and the said sum of 1250*l.* assured thereby, and all and every other sum and sums of money, benefit and advantages whatsoever, to be had, recovered, or obtained under or by virtue of the said policy, together with full power and authority to ask, demand, sue for, recover, and receive, and give effectual acquittances, releases, and discharges for the said sum of 1250*l.*: to have and to hold the same unto the said *Alexander M'Gregor*, his executors, administrators, and assigns, upon trust that he or they, when and so soon as the said sum of 1250*l.* should upon the death of the said *William Shearman* become due and payable under the said recited policy of assurance, should lay out and invest the same in his or their name or names, upon such securities as in this indenture mentioned, and should vary the securities as to them or him should seem expedient, and stand and be possessed of and interested in all and singular such trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce of the same respectively, in trust to pay and hand over such interest, dividends, and annual produce to the said *Annie Shearman* and her assigns during the term of her natural life; and from and immediately after the decease of the said *Annie Shearman*, then upon certain trusts, for the benefit of the children of the said marriage." And the indenture contained a proviso, that, if there should not be any child or children of the said *William Shearman* and the said *Annie Shearman* his wife, living at the time of the death of the said *Annie Shearman*, or if all of them should die before any, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, then and in that case the said *Alexander M'Gregor*, his executors, administrators, or assigns should stand possessed of the said policy of assurance, trust monies, stocks, funds, and securities, in trust and to and for the use

of the said *Annie Shearman*, her executors, administrators, and assigns, as for her and their own proper use and benefit. And the indenture also contained a covenant to the effect that he the said *William Shearman*, his heirs, executors, administrators, or assigns, or some or one of them, would well and truly pay or cause to be paid unto the said Assurance Company the said annual premium of 30*l.* 6*s.* 3*d.*, and all other premium and premiums, sum and sums of money as and when the same should from time to time become due and payable; and that he the said *William Shearman* during his life would not do, or suffer to be done, any act, deed, matter or thing whatsoever, or omit to do any necessary act whereby the said recited policy of assurance should or might become or be liable to be impeached, impaired, or void or voidable.

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The sum of 1170*l.* (80*l.* having been deducted for costs and expenses) came to the Plaintiff's hands, and the manner in which it should be invested or employed soon afterwards became a subject of dispute between the Plaintiff and his father-in-law, *Eyre Evans*, from whom the Plaintiff received an allowance of 100*l.* a year. Mr. *Evans*, his wife's father, objected to his entering a cavalry regiment, and expressed a wish for the money to be invested in railways. In reference to a conversation to this purport, the Plaintiff wrote to Mr. *Evans* the following letter :—

“ Dear Sir,—I have weighed in my mind what you said last evening on business, and I now write in the same strain. With regard to the 1170*l.*; I understood the money to have been given to my wife, who has lent it to me on my insuring my life for 1250*l.*, which has been done, and all deeds executed: therefore I cannot entertain any other person having power over it so long as I pay the insurance, and I keep the money until I can effect an exchange or procure some appointment that will prevent our going abroad. That I be-

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lieve to be the spirit in which the money was lent to me ; and I think I have sufficient experience in monetary affairs to be able to keep that small sum safe until required for the advantage of my wife and self. You appeared to imagine that because I am fond of a horse, that it will lead me to gambling. I assure you I have the greatest horror of that propensity, and I do not think I have bet to the value of 1*l.* in all my life. I don't deny of having raced a horse but I did not bet a shilling. I hope you will receive this in the way it is intended, in good spirit, and believe me yours truly,
W. SHEARMAN."

In reply to this letter, the Plaintiff received a letter from Mr. Evans, as follows :—

"Liverpool, 29th January, 1852.

"My Dear Shearman,—I received your letter with astonishment, and much regret the injurious consequences which must result from your acting upon mistaken views in respect to the money given by Mrs. Putland for the benefit of Annie. I did expect that you would have felt the necessity of being forward to satisfy me as to the security and proper application of this money, for the administration of which a trustee is appointed, who, and not yourself, should have received and disbursed it. Annie, upon whom and her children this 1250*l.* is settled, was not entitled to lend it, nor did I learn from her that you ever condescended to consult her about it. You strangely assume to have an acquired right over Mrs. Putland's gift by reason of the insurance effected on your life, and the bond which you have signed. The insurance I find is voidable if you be ordered abroad, and is therefore little worth the premium which is payable out of money claimed from myself. This insurance upon your life is necessary only for so long a time as the sum in question is invested in a commission voidable in case of your death. Were you to sell out and realise, the insurance may

be dispensed with, and so much of the proceeds of your commission as 1250*l.* would revert to the trustee, Mr. *M'Gregor*, appointed by me to be by him securely invested in conformity with the deed to which you are a party, and which in honour, equity, and duty you are bound to act up to. You surely cannot be considered as a third, separate, irresponsible party, entitled to the loan or use of this money (settled on your wife) for purposes unconnected with the trust. As to your bond, you cannot but know that its only use would be to give *Annie* or her children priority of claim on any property you may be possessed of on the occasion of your decease; but you seem to think that if *Annie* is secured in the event of her surviving you, that she is not to expect to claim any benefit or income from her aunt's gift during her lifetime. This is hard measure for her, and will in any case happen if you persevere, contrary to the advice of all your friends, in your intention of exchanging into a cavalry regiment, and indulging your passion for horses at the cost not to be calculated beforehand."

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The premium on the policy of insurance becoming due in November, 1852, the Plaintiff forwarded the notice to Mr. *Evans*, his allowance of 100*l.* a year being then in arrear; and the Plaintiff received in reply the following letter:—

"*Liverpool*, 6th December, 1852.

"Sir,—I received your letter, and I return herein the printed notice from the insurance-office at which a policy of insurance upon your life is effected, with the intimation that I shall not pay the premium thereon, nor confer any favours until you account to me for 1250*l.* advanced a year ago by my sister, Mrs. *Putland*, in anticipation of a legacy destined for my daughter, and intended, under my direction and control, for her benefit and advantage.

"I am, &c., yours,

"EYRE EVANS."

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McGowan.
 —
Statement.

The Plaintiff, by his bill and affidavit, stated that in consequence of his not receiving the promised allowance from Mr. Evans, he omitted to pay the assurance premium within the proper and necessary time, and the assurance dropped; but he, in making such omission, was not aware of the effect the omission to pay at the time might have, neither did he know the terms of the deeds he had executed or the particulars of the obligation he was under, by virtue of either the said deed or policy, and the policy was not and is not in his possession. He further stated, that, in reply to a letter written by him, relating to his right to the said sum of 1250*l.*, he received from Mr. Evans a letter as follows:—

“ I deeply regret to find you again repeating the subterfuge that your wife lent her aunt's money to you ; I before this told you that you never condescended to ask your wife for it ; that she had no power to lend it, or divert it from the purposes for which it was given ; that to part with it would have been a fraud upon Mrs. Putland's intentions. Moreover, the money was given by my permission ; and on the condition of being under any conditions I chose to impose. I directed and intended that the money was to purchase the paymastership, which was represented as offering pecuniary and other advantages ; that during your holding it an insurance was to be effected upon your life, and that the insurance was to be given up when you sold out. The proceeds of your commission, to the extent of the 1250*l.*, then to revert to the trustee, and to be invested otherwise for the security of your wife and your mutual annual benefit. Instead, however, of Mrs. Putland's gift of 1250*l.* (for which I grieve that she pays 80*l.* a year interest) being a capital producing a relative income, it has disappeared, leaving a worthless policy of insurance effected in your name, the annual cost of 30*l.*, proposed to be paid for by my money, in abatement of the allowance I was in the habit of making to add to the comfort of my daughter and yourself.”

The bill stated that the action was brought at the instance and suggestion of Mr. *Evans* ; and that although the policy had been dropped under the circumstances aforesaid, yet, by its subsequent revival, the covenants contained in the indenture, and the condition of the bond so far as either of them provided for the keeping up of the policy, had been substantially complied with.

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The Plaintiff, by his bill and affidavit, stated that he had always understood that the money so lent to him should be applied at his discretion either in purchasing an exchange, or in obtaining some military employment which would prevent his going abroad; and that he was not to be and could not be called upon to repay the same in his lifetime.

The Plaintiff moved for an injunction to restrain the action on the bond.

Mr. *Rolt* and Mr. *Giffard*, for the Plaintiff, argued that the present case was distinguishable from all those in which the Court had refused to relieve against the legal consequences of the breach of a covenant. It was material to observe that the case was not one between lessor and lessee, nor between mortgagor and mortgagee. It was the case of relief against the penalty of a bond, in which the interference of this Court was in all cases necessary before the Statute of Anne (*a*). The case was one in which the Plaintiff had been misled by the manner in which the arrangement had been explained to him, and the precise nature of which arrangement had probably not been perfectly understood by any of the parties. It would clearly defeat the original intention, if the Plaintiff were, in con-

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(a) 4 Ann. c. 16, s. 13.

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sequence of his accidental omission to pay the premium, now compelled to pay the money to the trustee. The security for the ultimate application of the money for the benefit of the wife and children of the marriage, was all that the parties contemplated, and that security is now as perfect as it ever was or was intended to be. Even in cases of insurance between a lessor and lessee, it has never been said that in no circumstances will the Court relieve against a strict breach. There might certainly be circumstances in which the lessee might have been misled by the language of the lessor, and from that cause have mistaken his liabilities, where the Court would restrain the lessor from taking advantage of the mistake. In another respect this case was distinguished from all those which had been before the Court; that in none of the cases had the party seeking relief restored the policy to its former state before the bill was filed,—so that he came before the Court with the identical policy, against the loss of which only the Defendant required to be indemnified.

Mr. Bacon and Mr. Piggott, for the Defendant, contended that there was no precedent for the interposition of this Court in such a case. The parties lending the money had clearly stipulated for two things,—the repayment of the fund at some time, perhaps after the decease of the Plaintiff; and, secondly, in the meantime, the continual security for that repayment by the existence of a policy of insurance. The second of these conditions the Plaintiff failed to fulfil, and the Court would not relieve him from the consequences of the breach.

The cases cited were *Elliott v. Turner* (a), *Eaton v. Lyon* (b), *Seton v. Slade* (c), *Hill v. Barclay* (d), *North-*

(a) 13 Sim. 477.

(b) 3 Ves. 689.

(c) 7 Ves. 265.

(d) 18 Ves. 56.

cote v. Duke (a), *Beech v. Ford* (b), and *Winthrop v. Murray* (c).

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The VICE-CHANCELLOR said, there was a fallacy in the reasoning on behalf of the Plaintiff, that, because it was only a question of the payment of money, and the Court, in cases of mortgage and otherwise, relieved against the strict legal condition, it should therefore also extend the same relief in a case where the premium of a policy of assurance had been omitted to be paid at the proper time, but had been subsequently paid. In the case of relief given to the mortgagor against a mortgagee where the title had become absolute at law, and in other cases founded on the same principle, the Court gave no relief until the party who had acquired the legal right was put in possession of the whole amount which he could claim; and when he had received all that he was entitled to, there was no reason why he should be permitted to go farther, and there was no possibility of future damage; but it was quite otherwise where the stipulation was to keep on foot a security. It would defeat the object of the stipulation if the Court were to hold it sufficient for the party under the obligation of paying the premiums and keeping on foot the security, to revive it at any time after the person for whose benefit it was created should have discovered that the obligation had been neglected. It was clear, that he had not had the security for which he had stipulated. He had incurred a risk, from which it was the duty of the other party to have protected him. In this case, it appeared by the Plaintiff's own letter, that he knew of his obligation to pay the premiums, for he said, "I cannot entertain any other person having power over it so long as I pay the insurance, and I keep the money until I can effect an exchange, or procure some employment that will prevent our going abroad." The right of holding the money

(a) Amb. 511.

(b) 7 Hare, 208.

(c) 8 Hare, 214.

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which he here asserted, was moreover not consistent with the deed.

Mr. *Rolt* replied.—If the Defendant relied upon an equity with reference to the proper application of the money,—if he insisted that the money was not in the hands of the party entitled to hold it according to the original intention of the parties, he ought to bring that case forward by a cross bill, in order that it might be fairly met. There was no doubt that the Plaintiff knew that he had undertaken to keep on foot the insurance, and he did not rest his case on mere ignorance, but on the fact that he had been misled by the correspondence, which might reasonably induce him to believe that the consequences would not be such as are now made to flow from it. He has now set the matter right, and has become aware of his position; it is not therefore a defence which he would be in a position to set up to any action founded on a similar breach of the covenant hereafter.

Judgment.

The VICE CHANCELLOR said:—That the Court could not in this case give the relief sought, upon the ground that the covenant to keep on foot the policy was satisfied by its revival after it had been allowed to drop; nor could such relief be given on the ground suggested, that the Plaintiff was ignorant of the effect of the instruments which he had executed, no fraud being alleged. [His Honor then stated the circumstances of the case, observing on the peculiarity, that although the deed recited that the sum in question was a loan, yet there was no provision for payment by the Plaintiff of interest upon it; and that in fact if the terms of the deed were complied with, and the policy kept on foot, no interest would be payable.] If therefore no interest were

payable by the Plaintiff, all that was intended to be secured was the repayment of the principal sum. The question was, whether, under all the circumstances, looking at the correspondence which had taken place, the Plaintiff might not be under the honest impression that all he was bound to do was to keep up the policy, and that the consequence of omitting to do so might be, that he would have to renew his insurance perhaps at a disadvantage, but not that he would then be liable to have the money taken out of his hands. In the letter from his father-in-law the nature of the deed was thus explained to the Plaintiff:—"You strangely assume to have acquired a right over Mrs. *Putland's* gift by reason of the insurance effected on your life, and the bond which you have signed. The insurance, I find, is voidable if you be ordered abroad, and is therefore little worth the premium which is payable out of money claimed from myself. This insurance upon your life is necessary only for so long a time as the sum in question is invested in a commission voidable in case of your death."—"As to your bond, you cannot but know that its only use would be to give *Annie* or her children priority of claim on any property you may be possessed of on the occasion of your decease." The transaction was in the nature of a family arrangement; and the Plaintiff had a claim to relief on the ground of the misapprehension and mistake of his position, into which he had been led by the representations which were made to him. The case was not one in which the parties stood in the simple relation of debtor and creditor; and without intrenching on the principles which the Court had laid down with regard to the right of enforcing the legal consequences of omitting to pay the premiums on policies of insurance, his Honor thought he was in a position in this case to grant an injunction to restrain the action on the bond, but on the terms of the Plaintiff in equity paying the costs of the action.

1853.
SHEARMAN
v.
M'GREGOR.
Judgment.

1852.

May 21

COX v. COX.

Where the plaintiff had contracted to correct and engrave from materials to be furnished by the defendant, a work which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration, according to the number of pages the work might contain; the Court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed,) with any material alteration or omission; and also refused an injunction to restrain the

defendant from printing, publishing, or selling the work, until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at law, and the title to it is not a ground for the interposition of a Court of equity.

Hemle, unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper.

THE defendant, a house and estate agent, in November, 1851, wrote to the Plaintiff, who was a barrister, as follows:—
 “I am writing a book which I intend to print, size 12mo., number of pages about one hundred and fifty. It is to be addressed to intending tenants and purchasers, and also proprietors of landed and house property. The object of the work will be to point out the difficulties attending the procuring and parting with residences and estates, and to suggest the remedies to guide the uninitiated into a right and speedy course of procedure, and to explain the methods, whereby they may avoid difficulties, and save both their time and their money. I propose to get my own printer (*Kemphead*), to print the book, and to have it published by *Longman or Rivington* at five shillings. I think I ought to have two thousand copies printed, and then stereotype the matter. My plan would be, to issue circulars to likely persons suggesting the purchase of the book, to distribute an advertisement among my own connexion, and to well advertise the book. At the end of the year, or early next year, I think I could complete the manuscript. Having made these statements, I am desirous of soliciting your opinion on the plan. The manuscript, as it came from me, would require considerable correction and revision, and I should like to know whether, and upon what terms, you would be kind enough to undertake this part of the business, and how long it would occupy you.”

Terms for correcting the proposed work were agreed upon between the two parties, at a certain rate per printed page. It being afterwards found that the Plaintiff would be required, not merely to correct the Defendant's manuscript, but also to supply much original matter, it was arranged, in 1852, that the work should be increased in size, so as to fill sixteen sheets; that the Plaintiff should complete the work from the materials supplied to him by the Defendant; and that he should write a part of the work, to consist of the legal information on subjects connected therewith, and receive for each printed page double the sum first agreed upon. The Plaintiff afterwards applied to the Defendant for liberty to publish the legal part of the work in a separate form, in his own name, and to use the same types for the purpose; to which the Defendant, on the 19th of November, answered, "I have not the least objection to your subsequently using the types of your legal part of my book. I myself neither want my work to contain more than one sheet of law, nor for any of it to be conveyed in a technical unpopular form. I am anxious for my book to be very readable, and the law part must be confined to whatever is useful to landlords and tenants, and vendors and purchasers, as such."

1853.
Cox
v.
Cox.
—
Statement.

The Plaintiff subsequently told the Defendant that it was impossible to introduce the legal part of the work into the compass of a sheet. The Plaintiff having entirely written the legal, and also written much of the general portion of the work, the manuscript was delivered to the Defendant, who, in March, 1853, gave the Plaintiff a paper of suggested alterations and omissions, and, among the rest,—

<p>"Real property . . . 62 Landlord and Tenant 57 — 119</p>	}	<p>"If these could be reduced to sixty pages, and all technicalities avoided in that sixty, I would print it, but other- wise would decline printing it at all."</p>
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The pages thus spoken of were pages of manuscript, of

1853.
 Cox
 v.
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which 119 were about equal to $3\frac{1}{2}$ printed sheets of the work. After some discussion, the Plaintiff stated that he was resolved that the whole should be printed or none, and added, that he would look through the manuscript, and see if any technicalities could be omitted: to which the Defendant assented. The Defendant, having obtained possession of the manuscript, commenced printing the work, and the Plaintiff corrected the proof sheets of certain parts of it, not including the legal part; and on the 5th April, 1853, he received from the Defendant a proof sheet containing a portion of the legal part of the work, not printed as the same had been written by the Plaintiff, but with various material alterations and omissions. The Plaintiff remonstrated at such alterations and omissions, and on the 6th April, 1853, wrote to the Defendant as follows:—
 “Before you printed any part of my MS. treatise on the disposal and management of property, I informed you that I would not allow its publication unless it appeared without any alteration and omission in the legal portion. I learned yesterday, that notwithstanding you are printing the MS. in a mutilated form. I give you notice that the publication of the MS. against my consent will be an invasion of my copyright, for which I shall take legal proceedings against you. If you question my legal title to the copyright, I am willing to receive from you a proposition to refer the question to the opinion of counsel. The terms on which I would consent to the publication are those already settled in your letters, namely, payment for the whole MS. at the stipulated rate per page, and the use of the types (set up) of the whole of the legal part.”

After some further communications between the parties, the Plaintiff filed his bill, charging, that the Defendant intended to cause the part of the work thereinbefore called the legal part, to be printed, published, and sold, with

material alterations and omissions made without the consent of the Plaintiff by the Defendant, or by some person employed by him; that some of such alterations erroneously state the law, and others of such alterations are in other respects improper; and that such omissions are all either positively improper or materially deteriorate from the value of the work; and such publication, with such alterations and omissions as aforesaid, will materially injure the Plaintiff's reputation; and that the Defendant had returned to the Plaintiff certain portions of the manuscript of the legal part of the work, which he positively refused to insert at all in the said work. And (par. 14) that the Defendant had never in any manner paid the Plaintiff for the said legal part of the work, and he had, in fact, only paid to the Plaintiff the sum of 15*l.* on account of the said work, leaving the sum of 60*l.*, or thereabouts, unpaid. The Plaintiff averred that he had caused an entry to be made in the book of registry of the Stationers' Company of the legal part of the said work, pursuant to the statute in that behalf.

1853.
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Statement.

The bill prayed that the Defendant might be restrained by injunction from printing, publishing, or selling, or causing to be printed, published, or sold, the part of the said work thereinbefore called the legal part, with any material alteration or omission made without the consent of the Plaintiff, and might be in like manner restrained from publishing or selling, or causing to be published or sold, any part of the said work, until the same had been paid for by the Defendant.

Mr. *Rolt* and Mr. *Southgate*, for the Plaintiff, moved for the injunction. *Argument.*
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Mr. *Bacon* and Mr. *Murray* for the Defendant.

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 v.
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Mr. *Bacon* and Mr. *Murray* for the Defendant.

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Judgment.

VICE-CHANCELLOR:—

The greatest difficulty in this case arises from the obscurity in which the contract is involved; it has never been reduced into a distinct form; and the terms are to be extracted from the letters and conversations between the parties. Looking, however, to the whole scope and frame of the case made by the Plaintiff, the circumstances seem to be these: the Defendant announced his intention of writing a work for the guidance of persons dealing with landed and house property, and, by the first arrangement between him and the Plaintiff, the latter was to correct the manuscript. The Defendant then sent to the Plaintiff a large quantity of undigested matter, which he expected him to put into form and shape. This being apparently considered by the parties as requiring more than the mere office of correction, a new arrangement is made, by which the Plaintiff is to complete the work from the materials supplied to him by the Defendant, and to contribute the legal information on the subjects of which it treated, for which he is to receive a certain remuneration. No agreement was come to as to the name under which the work was to appear. The case, therefore, stood thus: the Defendant said 'I am going to write a work, which you shall correct and put into shape, and a part of which you shall supply for a certain remuneration.' If that be so, the Plaintiff was evidently in the subordinate position of assisting in the production of a work which was to come out in the name and as the work of the Defendant. The work would be partly the Defendant's own composition, and it would be partly the work of the Plaintiff; but it was to come out as one entire publication, and to be paid for at one uniform rate. The bulk of the matter was apparently to be supplied by the Defendant. The Plaintiff employed himself in the preparation of a treatise on the law of vendor and purchaser, and landlord and tenant, the whole of which the Defendant desired to have compressed into one printed

sheet. The Plaintiff, on the other hand, thought that no information of value on the legal incidents of the property treated of could be condensed within that compass, and he extended this portion of the work to three sheets and a half. The Defendant then said, "If you will reduce this matter to one half of its present magnitude, I am willing to print it; if not, I decline to print it at all." This was an absolute rejection of the Plaintiff's contribution, except upon the terms of reducing it in quantity to the extent which the Defendant required. The Plaintiff, on the other hand, was resolved that the whole should be printed, or none. There was at this point of the transaction great difficulty in the way of any arrangement. The Defendant said, 'I will have only one sheet and three-quarters of legal matter;' the Plaintiff insisted that he should have three sheets and a half, or none. Then what followed? The Plaintiff looked over the manuscript again, but did not reduce it to the required dimensions; and the Defendant, although it had not been so reduced, took the manuscript in the state in which it had been left (which he could only have been entitled to do under the contract), and he began to print the work. The Plaintiff proceeded to correct the proof sheets; but (as he states), when he began to find that the legal portion of the work was introduced in a mutilated form, he intimated his refusal to consent to any alteration; and in this state of things the application is made for the injunction.

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—
Judgment.

I have stated what appears to me to be the substance of the contract between the parties, up to the time of the discussion as to the space which the legal matter should occupy; and that contract the Plaintiff has, by the fourteenth paragraph of the bill, treated as subsisting, for he thereby claims 60*l.*, as the unpaid part of the remuneration on the whole contract; on the other hand, the Defendant, having taken the manuscript and used it, cannot, I think, dispute his liability to pay for it, according to the terms of

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 —
Judgment.

the contract ; but that would be a question for a Court of law. Something was said with regard to the possible effect of the alteration of the Plaintiff's portion of the work, as affecting his reputation ; but, as it was held in *Sir James Clarke's case* (a), the possible effect on reputation, unless connected with property, is not a ground for coming to this Court, though it may be an ingredient for the Court to consider when the question of a right of property also arises. It was also suggested, that the Defendant was not entitled to make any use of the legal matter contributed by the Plaintiff, inasmuch as he had not paid for it ; that no property in that portion of the work had passed to the Defendant ; and that the Plaintiff had a right in the nature of a lien. It may be that the property in the manuscript has not passed, so as to enable the Defendant to come to this Court against a third party ; but it does not follow that it has not passed so as to prevent this Court from interfering, by way of injunction, between the Plaintiff and the Defendant. The Plaintiff has a clear right to sue for his 60*l.*, or whatever the balance may be ; and that right will remain, whether I grant the injunction or not. The existence of that claim does not entitle the Plaintiff to the aid of this Court, for the Court interferes to prevent injuries which cannot be properly compensated by damages.

The Plaintiff, however, claims a qualified copyright in the legal portion of the manuscript, under the arrangement by which he was allowed to publish it in a separate form, with the same type ; but I think that was a mere voluntary agreement, entered into after the original contract, and forming no part of it.

A serious question was then adverted to—but it is one which does not arise in this case—how far a party who had

(a) *Clarke v. Freeman*, 11 Beav. 112.

purchased a manuscript has a right to alter it, and produce it in a mutilated form?—how far, in a case in which the property has completely passed, it is to be assimilated to a case of goods sold and delivered, and thenceforward in the complete dominion of the purchaser? A qualified contract may be made; an essay may be supplied to a Magazine or an Encyclopædia, on the understanding that it is to be published entire; and it may be accepted by the editor, and paid for as what it purports to be. In the instance of an essay which has been accepted in that shape, the question might arise whether any curtailment could be allowed under that special contract. But here there is no such special contract. The contract is, that the Plaintiff shall supply the Defendant with the matter which is required, in such a form as to enable the Defendant to publish it as his own. I can find no circumstances from which any such special contract as I have mentioned can be inferred. The Plaintiff has indeed sought to make it a stipulation that his contribution of the legal materials shall not be published otherwise than entire; but this stipulation has no foundation in the original contract, upon which his case rests. It may well be, that this part of the work may suffer in value from the alterations made by the Defendant; but no one will probably expect to find the law set forth with any great amount of precision in a work issued by a house agent for the guidance of his customers in dealings of a simple character. If any such mistakes should occur in the legal portion of the work as the Plaintiff apprehends, he will have the remedy in his own hands, by correcting the errors in a subsequent work, in which he may publish his treatise in a distinct form.

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v.
Cox.
—
Judgment.

Motion refused. The costs of the motion to be costs in the cause.

1853.

May 4th,
July 4th, &
July 25th.

BARTON *v.* VANHEYTHUYSEN.
STONE *v.* VANHEYTHUYSEN.

A debtor, having contracted to purchase an estate, caused the conveyance to be made to trustees and trusts to be declared by deeds, dated in March, 1850, which recited the agreement of the debtor for the purchase, and that the conveyance to the trustees was by his direction, and declared the trusts to be for the sale of

THE first of the above suits was filed by a creditor of *Richard Edward Vanheythuysen*, deceased, for the administration of his estate, and seeking to set aside, in favour of his several creditors, certain deeds of conveyance, assignment, and declaration of trust, dated the 25th of March, 1850, and to render inoperative, as to certain property, a mortgage deed of the 29th of November, 1851. The second suit was filed by parties claiming to be mortgagees of all the real and personal estate of the deceased, under the deed dated the 29th of November, 1851, in priority to any claim which might be made under the deeds of the 25th of March, 1850; the second suit was, by amendment, also converted into a suit on behalf of the Plaintiffs and all other the creditors of the deceased.

the property, and retaining the proceeds for the benefit of the wife and children of the debtor. By one of the deeds of March, 1850, the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts, for his wife and children. The debtor was, at the date of these deeds, indebted to an extent which would render a voluntary disposition of his estate fraudulent under the stat. 13 Eliz. c. 5, as against creditors. The trustees were not informed of the assignment of the furniture to them, and it continued in the possession of the debtor, until the subsequent assignment next mentioned. By a mortgage deed, dated in November, 1851, the debtor conveyed and assigned all his real and personal estate to a creditor, to whom he had, after the date of the voluntary deeds of March, 1850, become largely indebted, to secure, so far as it would go, the debt owing to such creditor; and the creditor thereupon took possession of the furniture:—*Held*, that, although the purchased estate was never vested at law in the debtor, yet, as he had by the contract acquired an equitable interest in it, which interest was conveyed to the trustees under the voluntary deeds of March, 1850, such conveyance was fraudulent as against creditors under the stat. 13 Eliz. c. 5.

That the assignment of the furniture by the voluntary deed of March, 1850, was also fraudulent as against creditors.

That, as against the creditor entitled under the mortgage by the debtor of all his real and personal estate by the deed of November, 1851, although it did not specify in particular the purchased estate comprised in the voluntary deeds of March, 1850, those deeds were, as to such purchased estate, fraudulent and void, under the stat. 27 Eliz. c. 4; and, that that estate passed to such creditor by the mortgage deed of November, 1851.

That the furniture assigned to trustees by the voluntary deed of March, 1850, did not pass by the assignment of all the personal estate of the debtor by the mortgage deed of November, 1851; and that the creditor claiming under that deed did not acquire any specific lien or title to such furniture, either by the said deed or by the act of taking possession thereof.

Richard Edward Vanheythuysen, in the year preceding that of his death, bought a freehold estate at *Chiselhurst*, called *Holbrook-lodge*; and by a deed, dated the 25th of March, 1850, reciting that he had contracted to purchase such estate, the premises were "by the direction of the said *R. E. Vanheythuysen*" conveyed, by the vendor, unto and to the use of the Defendants, *Paterson* and *Jamieson*, upon trust to sell the premises, and stand possessed of the proceeds, upon the trusts of an indenture of even date. By the indenture of even date, which was a deed of assignment and declaration of trust, the jewels, plate, furniture, and other household effects and wines, which were then in, upon, or belonging to the premises called *Holbrook-lodge*, and the premises 31, *John-street*, *Bedford-row*, were assigned to the same trustees; and the trusts thereof, and of the monies to arise from the sale of the freehold and leasehold lands and premises therein mentioned, were declared to be for the benefit of the wife and children of the said *R. E. Vanheythuysen*. These deeds of conveyance, assignment, and trust, were not executed by the trustees thereby named; nor did it appear that the trustees were informed of the intention to assign the furniture and effects on the premises; and except that the same were removed by *R. E. Vanheythuysen* from one of the houses to the other, the furniture and effects after the assignment remained, as before, in his possession and control.

R. E. Vanheythuysen, at the time of his execution of the above-mentioned deeds, was indebted to an amount which, without the monies invested in the purchase of the *Holbrook-lodge* estate, he would not have been able to satisfy.

In August, 1851, *R. E. Vanheythuysen*, by means of a power of attorney, which he had obtained from *E. G. Stone* and *E. H. M. Stone*, Plaintiffs in the second and Defend-

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 —
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ants in the first suit, fraudulently sold a large sum of stock belonging to them, and appropriated the monies produced by the sale. Immediately upon the discovery of the fraud, Messrs. Stone took steps to recover from *R. E. Vanheythuysen* the monies so misapplied. They procured a re-transfer of some portion of the stock which had not been converted into money; but there still remained a sum of about 10,000*l.*, which *R. E. Vanheythuysen* was liable to restore. The latter, at the instance of Messrs. Stone and their solicitors, executed the mortgage deed of the 29th of November, 1851, whereby he was expressed to grant, convey, and assign to *G. Shepherd* (a Defendant in the first and Plaintiff in the second suit), his heirs, executors, administrators, and assigns, all and singular the real and personal estate, rights, and credits, whatsoever and wheresoever, of him the said *R. E. Vanheythuysen*, in trust to sell the same, and out of the proceeds of such sales to satisfy the debt owing to the Messrs. Stones. Upon the execution of this deed, *G. Shepherd* and the Messrs. Stones took possession of and sold the furniture and effects at *Holbrook*.

R. E. Vanheythuysen died in December, 1851.

It appeared from the evidence that the title-deeds of *Holbrook-lodge* were taken by *Vanheythuysen*, and by his direction placed in a box, marked "*Paterson and Jamieson*, trustees for Mrs. *Vanheythuysen*, of *Holbrook*;" and that, two or three months after the purchase, the box and deeds were carried to *Holbrook-lodge*, where they were found and taken possession of by the Messrs. Stones and *G. Shepherd*, their trustee.

Argument.
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Mr. *W. M. James* and Mr. *Beales* for the Plaintiffs in the first suit.

Mr. *Bacon* and Mr. *A. I. Lewis* for Messrs. Stone and

G. Shepherd, their trustee, Defendants in the first and Plaintiffs in the second suit.

Mr. *Prior* for the widow and children of *Vanheythuysen*, Defendants in both suits.

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VICE-CHANCELLOR (after stating the facts):—

I entertain no doubt that the conveyance of the 25th of March, 1850, was, under the statute of the 13 *Eliz.* c. 5, void as against creditors; and the chief question is, what was the effect of the deeds of that date, with reference to the subsequent deed of the 29th of November, 1851, which purports to convey and assign the real and personal estate of *Vanheythuysen* to *Shepherd*, as a trustee for Messrs. *Stone*?

I will first consider the position of Messrs. *Stone*, under the deed of the 29th of November, 1851, with reference to the statute 27 *Eliz.* c. 4, by which all voluntary conveyances are made invalid as against purchasers for value. I do not find that any question on the effect of this statute, under circumstances like the present, has arisen in recent times; but the principles which should govern such a case are, I conceive, plainly indicated by the authorities to which I am about to refer.

Two objections have been raised to the claim of Messrs. *Stone* under the deed of the 29th of November, 1851, and by force of the statute 27 *Eliz.* c. 4. It was first said, that the conveyance of the 25th of March, 1850, did not vest any property in *Vanheythuysen*, and that it was not a grant or settlement of real estate by him, so as to bring the case within the provisions of the stat. 27 *Elizabeth*, by which such a conveyance would be subsequently avoided. It was argued, that the purchase of an estate by a payment in the name of a child was not within the statute, and that

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Vanheythuysen did not, in this case, actually acquire the estate, but that it was, in effect, nothing more than giving the money to the wife and children, who by that means bought the estate; and text writers have questioned whether such a purchase would be within the statute (a). But, in the present case, the conveyance recites that *Vanheythuysen* had agreed to purchase the estate from the vendor, and thereby acquired the equitable interest in the estate; and the conveyance is, therefore, clearly a conveyance of his equitable interest in this estate to volunteers (b).

The second objection is more plausible. It is argued, that, inasmuch as the conveyance to the trustee for Messrs. *Stone* is expressed in general words, and purports to be a conveyance of all the real and personal estate of *Vanheythuysen*, without particularising the *Holbrook* estate, which was the subject of the voluntary conveyance, such estate, having been vested in others, was not intended to and did not pass; and that the 2nd section of the stat. 27 *Eliz.* c. 4, restricts the operation of the statute to cases in which the purchaser, for valuable consideration, takes "the same lands, tenements, or hereditaments;" and it was contended, that persons taking under a conveyance by such general words as Messrs. *Stone* in this case, could not be said to be purchasers of the "same" estate, which, under the circumstances and in the absence of any precise expression to that effect, it was not reasonable to suppose was intended by the grantor to be comprised. The fallacy in this argument consists in assuming that the first objection has been sustained, and in regarding the *Holbrook* estate as not in truth the property of *Vanheythuysen*, which, as between himself and a subsequent purchaser, I have held it to have been. I am of opinion that *Vanheythuysen* had clear

(a) See Robertson's "Fraud. Conveyances," Vol. 8, pp. 465 et seq.

(b) See Bythewood's Prec. by Jarman, p. 154, n.

power to pass the estate to a purchaser. This Court would not have interfered to restrain him from doing so, but would, on the contrary, have assisted a purchaser for value in procuring a conveyance. It cannot be disputed, that in taking the mortgage of November, 1851, the Messrs. *Stone* had a perfect intention to acquire all that *Vanheythuyssen* could give; and taking the estate to be his, as between him and the purchaser the words of description, "all my estate," would be sufficient to embrace it. That the statute has been expounded favourably, and not narrowly, is, I think, clear upon the authorities. The case of *Girling v. Lowther* (a) is an authority that subsequent judgment creditors are entitled to set aside a voluntary settlement by the debtor. In that case, the judgment creditor could not be said more truly than in the present case to have purchased the same settled estate, for he had only acquired by his judgment a general lien. The same argument against the judgment creditor might have been used there as was addressed to me in this case—that the estate was no longer the estate of the debtor, because he had made it the subject of the voluntary settlement. The circumstances of that case were these: Sir *Thomas Leigh* having made a voluntary settlement of an estate called the *Swan Inn*, afterwards became indebted, and gave a judgment. The *Swan Inn* was subsequently sold, to satisfy a prior incumbrance upon it; and the balance of the purchase money being in Court, the question arose who was entitled to it? And the Court declared that the voluntary conveyance ought not to stand in the way to prevent satisfaction of a subsequent judgment for good consideration, but that the children had preference over the other creditors not on judgment. It certainly occurred to me, on first reading the case, that it might possibly have turned on the stat. 13 *Eliz.* c. 5. There is no reference in the report to either statute; but the case

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(a) 2 Rep. in Chanc. 136.

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is always referred by the text writers to the statute 27 *Eliz.* c. 4, and not to the earlier statute; and the volunteers were preferred to the creditors who had no judgment. There is another case which occurred on the 2nd section of the statute, in which its operation is defined in somewhat different words. It is the case of *Garth v. Enfield*, in Serjt. *Bridgman's Reports* (a). Sir *Thomas Enfield* having made a voluntary settlement of real estate to the use of himself for life, with remainder to his son in tail, became bound in a recognisance; and the question was, whether parties entitled under the recognisance could set aside the voluntary settlement; and it was held that the lands were extendible in the hands of the son. It was said, "This statute doth not only aid purchasers of the lands, but those who for a valuable consideration have any charge out of the land or upon the land." It appears to me, therefore, both upon principle and authority, that the parties claiming under the mortgage deed of November, 1851, are entitled to the real estate comprised in the voluntary settlement of March, 1850, as against the parties claiming under that conveyance.

The next question is with regard to the personal chattels, to which the statute of the 27 *Eliz.* c. 4, does not apply. These chattels passed to the trustees of the deed of March, 1850, under the assignment of that date, and would not, therefore, be affected by the deed of November, 1851. I am much inclined to think that the assignment of March, 1850, was, independent of the statute, a covinous assignment at common law. The state of indebtedness of the maker of the deed at that time, the absence of any communication to the trustees with respect to the assignment of these chattels, and the fact that the assignor did not part with the possession, are material in this view; but still the Messrs. *Stone* cannot avail themselves of the objec-

(a) P. 22.

tions to the first assignment on the ground of covin, to acquire an interest in the chattels by virtue of their subsequent mortgage deed. In *Repton v. Basset* (a), mentioned in *Turgon's case* (b), it was agreed, "that, by the common law, an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand, as a sale in open market by covin shall not bar a right which is more antient; nor a covinous gift shall not defeat execution in respect of a former debt; but he who hath right, title, interest, debt, or demand, more puisne, shall not avoid a gift or estate precedent by fraud by the common law." It is, I think clear, that although this conveyance was fraudulent, yet it had the effect of passing the property. When a voluntary settlement is once avoided, under the statute 13 *Eliz.* c. 5, all the subsequent creditors are let in, together with those creditors against whom the settlement is fraudulent within the statute. But to what are such subsequent creditors let in? Not to an estate in the chattels, but a right as against them. The previous assignment, therefore, is necessarily good against such subsequent creditor claiming merely in that character. He can only enforce such claim under the stat. 13 *Eliz.* c. 5, as a person delayed by the voluntary gift, within the meaning of that statute. This may be considered as somewhat hard upon the Messrs. *Stone*; for, if they had recovered a judgment against *Vanheythuysen*, they might have obtained possession of the goods; but they claim under the assignment only, and by the assignment they could not acquire any right in these chattels.

It was then contended that a right to the chattels was acquired by Messrs. *Stone*, by the act of possession being taken of them, on their behalf, immediately after the assignment of November, 1851; but I am clearly of

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(a) 3 Rep. 83 a, b.

(b) Id. 80 a.

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opinion that Messrs. *Stone* could not, by taking possession of the chattels in pursuance of their mortgage deed, acquire any right to them as against the prior assignment. The case is not like that of a party seeking to take possession under a judgment, who finds that his right is impeded by a prior judgment creditor. The claim of the Messrs. *Stone* is of a totally different character; it is founded only upon the assignment, which gives him no specific right to the chattels which had passed by the prior deed. It is only as general creditors of *Vanheythuyssen* that they have any right as against such chattels.

Decree.

This Court doth declare, that the deed of conveyance of the 25th day of March, 1850 (so far as the same relates to the equitable fee simple and other estate and interest of *Richard Edward Vanheythuyssen*, deceased, in the freehold, copyhold, and leasehold lands and premises therein comprised), and the deed of assignment and declaration of trust of the 25th day of March, 1850 (so far as relates to the monies to arise from the sale of the said freehold, copyhold, and leasehold lands and premises), are void as against *George Shepherd*, *Edward Gresley Stone*, and *Edward Henry Montague Stone*, in the second mentioned clause, claiming under the deed or mortgage security of the 29th day of November, 1851, in &c. And this Court doth declare that the Plaintiffs in the said second above-mentioned cause have, as mortgagees as last aforesaid, a good and valid charge on the freehold, copyhold, and leasehold lands and premises comprised in the said conveyance of the 25th day of March, 1850, in all other the real, and (save and except the jewels, plate, furniture, and other household effects, and wine, next hereinafter mentioned,) on all the personal estate and effects, rights and credits, of or to which the said *Richard Edward Vanheythuyssen*, deceased, was seised, possessed, or entitled, at the date of the said deed or mortgage security of the 29th of November, 1851. And that the same real and personal estate and effects, rights and credits, passed by the said last-mentioned deed to, and are vested in, the said *George Shepherd*, as trustee upon the trusts thereof. And this Court doth declare, that the said deed of assignment and declaration of trust of the 25th day of March, 1850 (so far as relates to the jewels, plate, furniture, and other household effects, and wines, of which the said *Richard Edward Vanheythuyssen*, deceased, was possessed at the date of such last-mentioned deed, and which were then in, or upon, or belonging to

the premises called *Holbrook-lodge*, and the premises No. 31, *John-street, Bedford-row*, and the monies to arise from the sale of the same) was and is void as against the Plaintiffs in both the above-mentioned causes, and all other the creditors of the said *Richard Edward Vanheythuyssen*, deceased. And it is ordered that the following accounts and inquiry be taken and made, that is to say :—

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1. An account of what is due to the several Plaintiffs in the above-mentioned causes, and all other the creditors of the said *Richard Edward Vanheythuyssen*.

2. An account of his funeral expenses.

3. An account of his personal estate come to the hands of the Defendant *Caroline Vanheythuyssen*, his executrix, or to the hands of any other person or persons by her order, or for her use, distinguishing such parts of such personal estate as he was possessed of or entitled to at the date of the said deed of the 29th day of November, 1861, and which passed thereby, from the other parts of such personal estate.

4. An inquiry what parts, if any, of the personal estate of the said testator are outstanding or undisposed of, and in such inquiry the personal estate so outstanding is to be distinguished in manner aforesaid. And in case it shall appear that the personal estate of the said testator is insufficient for the payment of his debts and funeral expenses, then it is ordered that the following inquiries be made :—

5. An inquiry what real estates the said testator died seised of or was entitled to, at the time of his death, not comprised in the deed of the 25th day of March, 1850.

6. An inquiry what incumbrances, if any, there were affecting the same estates other than the charge hereby declared ; and if it shall appear that there were other incumbrances, then it is ordered that their priorities be ascertained, and an account taken of what is due thereon respectively. And in taking the said accounts hereby directed, all just allowances are to be made to the parties. And this Court doth declare that the real estate is liable to make good the deficiency of the personal estate to pay the debts and funeral expenses. [Direction for bringing into Court the purchase-money of *Holbrook-lodge*, which had been sold under a prior order ; for taxing the costs of the trustees of the deed of 1850, of an action at law ; and for the payment of such costs by Messrs. *Stone* ; and for reserving further consideration.]

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May 6th, 7th,
& 9th.

The rule under which the Court permits a stranger to intervene for the purpose of opening bid-
dings on a sale by auction before the Master, has no application to a sale before him by private contract.

When the Master has, in the presence of the parties, approved of a sale by private contract, whether under a special reference, or under the 4th General Order of the 16th of July, 1851, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the Court on the mere ground that a larger price has been offered subsequently and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate.

When there are grounds upon which the Court would refuse to confirm a sale by private contract approved by the Master, the fact that the purchaser has, after the approval of his contract, and before the confirmation of the report, entered upon the property, and expended money thereon, or incurred liabilities with respect to it, will not afford any reason for supporting the sale; for such acts, before the confirmation of the report, are done at the purchaser's own risk, or in his own wrong; but where all the parties interested in the estate have approved of or acquiesced in the contract, and concurred in and encouraged such acts of the purchaser, they may then constitute reasons for not disturbing the sale.

BY an order of the Court, dated the 23rd of January, 1852, made at the hearing of the cause, it was among other things ordered that the estate called "*Whilton-lodge* and land adjoining, containing 225 acres or thereabouts, with the water corn-mill, and public-house, standing thereon in *Whilton*, in the county of *Northampton*, should be sold with the approbation of the Master," and that the purchase monies should be paid into Court.

The Master, by his separate report, dated the 19th of April, 1853, found, that the said estate was of freehold tenure, and that by a memorandum in writing dated the 2nd of February, 1853, intituled in this cause and then remaining in his office, and marked with the letter A., *George Samuel Jenkinson*, of *Weedon*, Esquire, acknowledged that he had purchased the estate described in the particulars therein referred to for the sum of 15,000*l.*, and that he thereby bound himself, his heirs, executors, &c., to pay the said purchase money or sum of 15,000*l.*, and to complete the purchase in all respects according to the conditions therein referred to. And the Master found that by one of the said conditions it was stipulated that the purchaser (among other things) should, on the 25th of March then next, pay the said 15,000*l.*, and also as part of the

purchase money the amount of certain valuations amounting to the further sum of 125*l.* 17*s.* 9*d.* And the said Master found by an affidavit of *T. D. F. Tatham* (a land surveyor), that in his opinion the sum of 15,000*l.* was the value of the said estate with the timber thereon. And that it would be for the benefit of the parties interested therein, that the said estate should be sold for the said sum of 15,000*l.* And he also found by an affidavit of the Defendant *R. M. Freeman*, that on the 19th of October, 1848, (being before the filing of the claim in this cause), the said estate was put up for sale by public auction, and that the same was bought in, no person having bid a reasonable sum for the purchase thereof; and that he had made every exertion since the said estate was so put up for sale to find a purchaser for the same, but without success: that he had received from the said *George Samuel Jenkinson* a letter (set out in the said affidavit) containing an offer of 15,000*l.* for the said estate; and that in his, the said Defendant's opinion, the said offer was the best price that could be obtained for the said estate; and that it would be for the benefit of the testator's estate, and the parties beneficially interested therein, that the same should be accepted. And the said Defendant, *R. M. Freeman*, appeared before the said Master by his solicitor and also attended himself in person, and both by himself and his solicitor admitted before him assets of *Elizabeth Langton Bradshaw*, and that there had come to her hands in her lifetime as residuary legatee of the testator, *Aholiab Bradshaw*, personal estate of the said testator not specifically bequeathed, sufficient with the proceeds of the estate directed to be sold as aforesaid, if the same sold for the sum of 15,000*l.*, to pay all the legacies bequeathed by the said testator, *Aholiab Bradshaw*, and all interest thereon, and also all the costs of this suit; and it was also stated before him by and on behalf of the said Defendant, *R. M. Freeman*, that any

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communication with Mr. *Burton*, the solicitor of *Beriah Botfield* thereafter named, (and who it was mentioned before him had, two days previously, written to the Plaintiff's solicitors respecting the sale of the said estate,) would lead to no satisfactory result, and that any delay in accepting the offer of the said Mr. *Jenkinson* might lead to his retracting it. And upon the evidence and under the circumstances aforesaid the said Master was then of opinion that it would be for the benefit of the parties interested, that the said estate so directed to be sold with his approbation as aforesaid should be sold by private contract to the said *George Samuel Jenkinson* at the said price of 15,000*l.* subject to the conditions thereinbefore referred to. And on the 28th of January, 1853, the Master approved of his proposal to be such purchaser, and directed a report to be prepared accordingly; but since such approval, namely, on the 15th of April instant, a proposal on behalf of *Beriah Botfield*, of *Norton Hall*, in the county of *Northampton*, Esquire, had been laid before him, together with certain affidavits therein mentioned, and by which proposal the sum of 16,000*l.* was offered for the said estate upon the terms in the said proposal mentioned, and which was then remaining in his office and marked with the letter B.

The Plaintiffs, by their petition, prayed that the Master's report might be confirmed, and that *George Samuel Jenkinson* might be approved of as the purchaser of the estate, or that it might be referred back to the Master to approve of a proper contract with *Beriah Botfield* for the purchase of the estate for 16,000*l.*; and that in the latter case proper directions might be given with regard to the costs of *George Samuel Jenkinson* and the other parties in respect of his said proposed purchase.

The circumstances of the case appearing on the affidavits

to which the Court considered it material to advert, other than those which were stated in the Master's report, will sufficiently appear in the judgment.

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Argument.

Mr. *Baily* and Mr. *Humphrey*, for the Plaintiffs.

Mr. *Faber* and Mr. *Cole*, for the several Defendants.

Mr. *Rolt*, and Mr. *Schomberg*, for *B. Botfield*, submitted, that the case for admitting his offer of an increase of 1000*l.* on the purchase money was much stronger where the sale was, as here, by private contract, than the case of opening biddings where the sale was by auction; and that, in this case especially, there were evident circumstances of haste and imprudence in entering into the contract with Mr. *Jenkinson*, whilst the parties conducting the sale had notice that an inquiry had been made by Mr. *Botfield*, without any communication with him.

The *Solicitor-General*, and Mr. *Giffard*, for *G. S. Jenkinson*.—This is the first attempt which has been made to apply the rules of the Court as to opening biddings in sales by auction, to sales by private contract; whereas, the course of proceeding is entirely different, and the practice in the former case, and the reasons upon which it is founded, have no analogy with the latter.

The cases cited in the argument were, *Vernon v. Thellusson* (a), *White v. Wilson* (b), *Morice v. Bishop of Durham* (c), *Dykes v. Taylor* (d), *Vesey v. Elwood* (e), *Executors of Fergus v. Gore* (f), and *Lumley v. Wagner* (g).

(a) 10 Beav. 452.

(b) 14 Ves. 151, 153.

(c) 11 Ves. 57.

(d) 16 Sim. 563.

(e) 3 Dr. & War. 74.

(f) 1 Sch. & Lef. 350.

(g) 1 De Gex, M'N. & G. 604.

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—
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VICE-CHANCELLOR:—

The question in this case arises upon the sale of an estate under a decree of the Court. There is some novelty in the circumstances. The sale has taken place under the 4th General Order of the 16th of July, 1851, which directs, "That, when any property is directed to be sold before the Master, the Master shall be at liberty, either before or after such property shall have been put up for sale by public auction, to receive proposals for the sale thereof, or of any part thereof, by private contract; and he shall make his report thereof, with his opinion thereon, to the Court; which report shall be submitted to the Court for confirmation, in the same manner as reports made upon special reference as to sales by private contract" (a).

If the question between the parties turned on the effect of any general rule, I should have thought it of such considerable importance in point of practice, that I should not have decided it without conferring with the other Judges of the Court; but I do not think that the present case involves the consideration of any general rule of practice.

There are material distinctions between a sale by private contract and a sale by auction before the Master, in the ordinary way. Sales by auction before the Master are of a peculiar character. The person who is the highest bidder knows that he is not the purchaser until the confirmation of the report, and that, until such confirmation, any stranger may apply to the Court to open the biddings; and that, upon such an application, the party making it does not necessarily become himself the purchaser, but upon his making a sufficient advance by deposit in Court the sale is continued, and the property is again put up to auction. All persons bidding at sales before the Master are aware that

(a) Beav. Ord. Can. 450.

they are of this peculiar character. I cannot, however, concur in the argument which was addressed to me in this case, that a distinction between sales by auction and private contract was, that the purchaser was not bound in the former case until the confirmation of the report.—Lord *St. Leonards* in *Vesey v. Elwood* (a), after considering the cases of *Ex parte Minor* (b), and *Anson v. Towgood* (c), came to the conclusion that the purchaser was bound before the confirmation of the contract by the Court. He held this in the strongest case which can be supposed—in which a life dropped in the meantime, before the purchaser could, according to the practice of the Court, have confirmed the report. There is in truth no hardship in this rule, for every person bidding at such a sale knows that his bidding amounts to a contract which binds him, although he may never have the benefit of it. But there is a very material difference as to the position of a party who has made an offer by bidding at the auction, and one who has made an offer on a sale by private contract. The purchaser at a sale by auction has it in his own power to come to the Court and get his contract confirmed, and he knows that within a given time his purchase must be disturbed or established. But a purchaser by private contract has no such power to make himself the complete owner of the estate. The parties to the cause who are the parties interested in the estate, in such a case appear before the Master, and the question whether the contract be or be not a proper contract to be carried into effect is discussed in their presence. Each party is at liberty to urge any objection to which the contract may appear to him to be open; and, after hearing their objections, if any, the Master makes his report, which report is to be confirmed, not by the purchaser but by the parties to the cause, who may renew their opposition to the sale in the form of excep-

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(a) 3 Dr. & War. 74. (b) 11 Ves. 559. (c) J. & W. 637.

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tions to the report. Now, clearly, that is not a state of things in which any stranger can come to the Court and say, "I will give a higher price ; let me in to complete the purchase, instead of the party whose offer has been approved." No doubt, it is right, that some person should have the power of bringing forward such a matter, and the Court will always reserve to itself the power of accepting the offer of a considerable enhancement of the price. In this case it was arranged by all the parties to the cause, that the person who had offered the advanced price should appear, to suggest such reasons as he could why the advanced price which he had offered should be received. But, clearly, a rule which allows strangers to intervene where the sale has been made by auction, cannot be taken to apply to a case like this—of a sale by private contract, in which the parties have an opportunity of appearing before the Master. Upon reference to the Master to see if a particular contract be a proper one to be accepted, the Master can only consider that question, and no stranger can come in and say, "Admit me as the purchaser, for I will give a higher price." But, with regard to the parties in the cause, they may have objected to or resisted the adoption of the contract ; and it is right that they should have an opportunity of excepting by way of petition, and of bringing the question before the Court for reconsideration, when the Court may determine whether the Master has come to the right and proper conclusion. A power of this kind the Court must always have, if informed by any of the parties, or if, from circumstances come to the knowledge of the parties, it should appear that the sale is so improvident, that it is one which is improper to be made of any trust property. If, for example, the case could be put as high as *Mortlock Buller* (a), the Court would refuse to part with an estate under circumstances in which it would not allow any trust

(a) 10 Ves. 292.

to dispose of it. But, short of that, a sale by private contract cannot be assimilated to a sale by auction; and the mere circumstance, that a high price has been offered, is not enough to induce the Court to open the proceedings which have been taken in the Master's Office.

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In the present case, the parties who conducted the sale under the order of the Court asked, by their petition, whether, under all the circumstances, the sale should be confirmed. They say that they in no way objected to the sale at the time the contract was approved; but they think it right to mention to the Court that since that time it has appeared, that, in lieu of 15,000*l.*, another person is willing to give 16,000*l.* No doubt, *prima facie*, that fact, if wholly unexplained, would appear to be evidence of a great miscarriage having taken place,—that there must have been at least some want of precaution on the part of the parties conducting the sale; and as there were other circumstances which tended to shew some degree of negligence on their part, I wished to hear such an explanation of the facts as counsel would suggest.

It appears that in 1848, Mr. *Burton*, as solicitor to Mr. *Botfield*, offered 14,900*l.* for the estate, exclusive of the timber; and in 1852 the same gentleman made a communication to the solicitors of the Plaintiff, expressing a wish to know whether the estate would be sold; and he was then informed that the suit was in progress, and that the probability was that the estate would shortly be offered for sale. Mr. *Burton* says, he concluded thereupon that the sale would be by auction in the usual way, but, as a solicitor, he ought to have known that the Court had power to sell by private contract as well as by auction. Immediately afterwards we find communications opened between Mr. *Freeman* and Captain *Jenkinson*. Mr. *Freeman* represented several persons: he was the personal represen-

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tative of *Aholiab Bradshaw*, the testator, and also of Mrs. *Bradshaw*, and he was also residuary legatee under the will of the latter ; and in these capacities, it appeared that if the estate was more than sufficient to answer the charges upon it, he would become the proprietor of the estate or of the surplus.

Aholiab Bradshaw, the testator, was the original owner of the estate in question : he had entered into a contract for its sale, which he had not completed, before his death. The purchaser subsequently entered into an agreement with Mr. *Freeman*, by which Mr. *Freeman* agreed to take back the estate in satisfaction of a debt of 16,700*l.*, being the unpaid purchase money and a large arrear of interest. The result was, that Mr. *Freeman* became answerable to the testator's estate for the whole amount of mortgage money and interest, which would thus considerably exceed the 15,000*l.* Mr. *Freeman*, then, occupying this position, and being resident upon the property, entered into communication with Captain *Jenkinson*, who proposed to become a purchaser at the sum of 15,000*l.* Mr. *Freeman* communicated his proposal to the Plaintiff and his solicitor, who seemed perfectly willing to adopt the proposed contract on behalf of the legatees ; and it was finally arranged that it should be brought before the Master for his approbation, and supported by the evidence of surveyors of the nature and value of the property. This was the state of things, when, on the 26th of January, 1853, Mr. *Burton*, the solicitor of Mr. *Botfield*, wrote both to Mr. *Freeman* and the solicitors of the Plaintiff, saying that he had a client who should have some notice of the sale before it was made, as he was anxious to purchase the estate, and willing to take it at more than the market price. On the 27th of January the affidavit of the surveyor to the effect that 15,000*l.* was the value of the estate was prepared, and on the 28th of January, this evidence and the communication

om Mr. *Burton* were brought before the Master ; and at the same time it was intimated, that it would not be desirable to enter into any treaty with Mr. *Burton*, and that there would be danger in delay, as Captain *Jenkinson* might change his mind, and withdraw his offer. I must say, that I entertain considerable doubt whether the more ordinary and wiser course of proceeding in such a case would not have been to have answered the letter of Mr. *Stfield's* agent, and requested him to make a definite proposal. It must be recollected, however, that the fact was truly before the Master ; and although he was told it would be useless to enter into communication with Mr. *Burton*, the Master might have exercised his discretion in the matter by saying, "It may be so, but I should prefer to ask him what he will give." It was competent to the Master to do this, if he had thought that it was the discreet course to take ; but that was not his opinion at the time, and he did not give that direction : and I think that this is one of the cases in which it would not be right for me, sitting here, to interfere with the discretion of the Master, in the absence of any improper motive or bias on the part of those who were conducting the sale. The course ultimately adopted was, that the proposal in the form in which it was made by Mr. *Burton* was not received ; and the more the circumstances are examined, the more, I think, it appears that the manner in which the discretion was exercised with regard to the final sale was not only bonâ fide, which nobody for a moment doubts, but also, that it was wise. In the first place, Captain *Jenkinson* was dealing with Mr. *Freeman*, a person resident on the estate, and who therefore had the best means of knowing its exact value. It cannot be suggested that Mr. *Freeman* had any interest in disposing of the estate at an under-value. All his interest was the other way. In approving the contract with Captain *Jenkinson*, the Master took the precaution of saying, "You, Mr. *Freeman*, think that the indefinite proposal of Mr.

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Burton should not be further considered; and if I adopt your suggestion, I must require you to admit assets for the payment of all the legacies in case this purchase money should not be sufficient." Nothing could be more convincing that Mr. *Freeman* considered that he obtained the best price than that he made himself personally liable to pay the deficiency. Again, there is no reason why Messrs. *Wilde*, the solicitors for the Plaintiffs, should not have accepted any other and more beneficial proposal that might be made, except the apprehension that Captain *Jenkinson* might withdraw his offer.

Upon the approval of his proposal by the Master, the purchaser certainly did a very imprudent thing in immediately laying out money in planting on the estate. I should be sorry to have it supposed that a purchaser could rely upon his having entered upon the estate before confirmation of his contract, and, having made extensive improvements, or done other acts of ownership, as being any ground for not disturbing the contract, if there were other grounds which would induce the Court to do so. If in his haste he should lay out money upon the estate, he must understand that it is entirely at his own risk.

Now, what happened after the approval of the purchase was very remarkable. The Master, on the 28th of January, approved of Captain *Jenkinson* as the purchaser, notwithstanding the letter of *Burton*; and the solicitors of the Plaintiffs, by the Master's direction, informed *Burton*, that the Master did not see any reason for suspending his approbation of Captain *Jenkinson's* proposal. Mr. *Burton* must be taken to have known, that the contract approved by the Master is not definitely binding until it is confirmed by the Court; I cannot, therefore, understand the course which he took in lying by so long. He first took upon himself to deal with Captain *Jenkinson* for the property; and his

conduct in this respect is certainly a little singular. He does not tell Captain *Jenkinson*, that the property has been sold to him at an undervalue; but, on the contrary, he tries to persuade him that he has got rather a bad bargain. He observes, that the purchase money will amount to 15,120*l.* or 15,197*l.*, and points out all the inconveniences arising from the vicinity of the canal and of the railway. In the long correspondence between him and Captain *Jenkinson*, he depreciates the estate as much as possible, with the single exception of an intermediate letter to Messrs. *Wilde*, in which he asks if there be no hitch by which his client can be let in? But even then he does not propose or bind himself to make any advance on the amount of the purchase money. This correspondence goes on until the 27th of March,—the contract itself having been drawn up and executed by Captain *Jenkinson* on the 2nd of February,—and he having been informed by the solicitors conducting the suit for the Plaintiffs, that they will take steps to obtain the confirmation of the contract. It is material to observe, that Captain *Jenkinson* could himself take no step in the suit for that purpose; he might bring forward the parties to the cause, but he could himself do nothing in the matter. Now, if there had been any contest before the Master, the purchaser would have been put on his guard,—he would have known that the parties might bring the subject before the Court, and that any steps taken by him with reference to the property might be to his own prejudice or loss. But here, all parties acquiescing, he on the 2nd of February had entered into the contract, which was to be completed on the 25th of March. It was, therefore, of course important for him to have tenants on the land, and so, with the assistance of Mr. *Freeman*,—there being no hint or suggestion of the least possibility of the report being objected to,—he enters into arrangements, and fixes himself by contracts with tenants. He then, with the approbation and almost at the instigation of *Freeman*, proceeds to expend

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200*l.* or 300*l.* in planting, and in other improvements. I wish it to be understood, that I cannot for a moment hold that a purchaser acting thus, under ordinary circumstances, or where any question had been raised by one of the parties before the Master as to the propriety of the purchase, so that there was the least probability that it might be again contested in Court, would thereby acquire any claim to be protected in his purchase. Any such acts must be in his own wrong. But it is a different thing in a case like this, where no party can object to the report, except parties to the cause, and all these parties are actively concurring in the adoption of the contract, and the most interested are encouraging the purchaser to enter, make improvements, and incur liabilities to incoming tenants. Unless there were some manifest error or miscarriage, or evidence of a grossly inadequate consideration, so that the Court would not permit a trustee to part with trust property under such circumstances, I cannot, at the instance of a third party, or even at the instance of a party to the cause, now interfere to set aside the sale. Some prefer that a sale shall be made by auction, others that it shall be by private contract. The parties to the cause, with the sanction of the Court, have selected one course; proposals have been laid before the Master, and have been accepted, and a sale has been made by a trustee of the property, which sale, I think, ought not to be disturbed, except there were such miscarriage, or a gross inadequacy of price, as I have mentioned.

Is there, then, any evidence of this sale having been made at an undervalue, or of any miscarriage? There is none. If this purchaser be ready to give 1000*l.* beyond Captain *Jenkinson*, that may be because he has such an object in obtaining the estate as would induce him to give, as he himself says, more than the market value. There is no evidence of surveyors that 15,000*l.* is too low a price. This person, on a previous application, offered 14,900*l.*, other evidence

points to 15,000*l.* *Freeman*, and all the parties interested, concur in the sale; and we find that *Burton* himself, writing to *Jenkinson*, does not threaten to vacate the contract on the ground of under-value, but represents to him what a hard bargain he had made; and, then, for the first time, on the 27th of March, after the time fixed by *Jenkinson's* contract for the completion of the purchase, a definite offer was made; but it was an advance of 500*l.* only, which would scarcely have been enough to open the biddings in a sale by auction. It was not till the 13th of April that he offers an advance of 1000*l.* These circumstances afford no evidence of any miscarriage on the part of the persons conducting the sale.

I think it is a question well worthy of consideration, whether the Court ought, as to contracts for sale made by its officer, to act upon any other principles than those of fairness and justice, which ought to regulate the conduct of private parties entering into similar contracts. I will put the case in this way:—Suppose Mr. *Freeman*, a trustee for sale, being about to enter into the contract with Captain *Jenkinson*, had on the day before signing the contract received the letter from Mr. *Burton*, stating that he would give more than the market price,—the question having then presented itself to Mr. *Freeman*, whether he should open a communication with Mr. *Burton* or not, he had resolved not to do so, and had the next day signed the contract with Captain *Jenkinson*,—would the Court, if it should some months afterwards appear that the trustee might have realised a larger price, say that he was not justified in completing the contract, or that it should not be carried into effect? I think not.

The Master's report, approving of Captain *Jenkinson* as the purchaser, must be confirmed.

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The *Solicitor-General*, on behalf of Captain *Jenkinson*,

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submitted, that he ought to be at liberty to retain, out of his purchase money, his costs of the appearance on this petition. The parties to the cause had allowed Mr. *Botfield* to come into the Master's office, and to state his case to the Court, which was irregular. Before they had permitted Mr. *Botfield* in any manner to intervene, or indulged him by enabling him to appear before the Court, they should have required him to enter into an undertaking to pay all the costs occasioned by his proceeding.

Mr. *Schomberg*, on behalf of Mr. *Botfield*, claimed his costs as acting for the benefit of the estate.

Mr. *Baily*, Mr. *Humphry*, and Mr. *Faber*, for the different parties to the cause, contended, that the parties had appeared voluntarily, and were not entitled to costs out of the purchase money, or out of the estate.

VICE-CHANCELLOR:—

All the ordinary expenses of confirming the report must be borne by the estate. The only question is as to the extra expenses occasioned by this discussion. Looking to the nature of the petition, all parties feeling that it was difficult for them actively to enter into the contest, they are not unwilling that Mr. *Botfield* should come here to argue the question for them adversely as against the purchaser. With regard to the latter, I am clearly of opinion, that, in the case of a sale by private contract, the purchaser has no right to appear. I must take it that the parties have brought Mr. *Botfield* here for the benefit of the estate, though it ultimately turns out that he takes nothing by his application. The 15,000*l.* when paid in will be a part of the estate to be administered. Out of that estate the general costs are to be paid; and I think the general costs of this application are to be considered part of the general costs of administering the estate.

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PEACE v. HAINS.

May 9th.

THE Master, under the order of the Court, allowing him to report special circumstances as to the debts or debt due from the Defendant, *J. D. Hains*, to *Parton Hains*, the testator in the cause, found that the Defendant, *J. D. Hains*, had executed a mortgage, dated the 8th of March, 1834, to the testator, whereby, in consideration of 550*l.* paid by the testator, *J. D. Hains* conveyed to the testator, his executors, &c., the residuary share of him (*J. D. Hains*) in the personal estate of one *Robert Hains* therein named, subject to redemption, on payment by *J. D. Hains* to the testator of 550*l.*, with interest at 5*l.* per cent., on that day twelve months. The Master also found that the testator was possessed of a promissory note of *J. D. Hains*, dated the 11th of August, 1834, for 100*l.* value received, with interest at 5*l.* per cent. until paid. And the Master found that it had been submitted to him, that these sums of 550*l.*, and 100*l.*, with interest thereon respectively, from the 23rd of April, 1846, were debts due from *J. D. Hains* to the testator; and he found that there was in one of the testator's books the following entry in the testator's handwriting:—

“Not to
be en-
forced.” “1836, May.—*J. D. H.*, cash lent on security
of the Mornington Estate, residue, &c. at five } £650.
per cent.”

A testator wrote in his account book, opposite an entry of two debts owing to him by his brother—one being due upon mortgage, and the other upon a promissory note—the words, “Not to be enforced;” but he received interest upon both debts for several years after the date of the entry, and up to the time of his death. The document which contained the words referred to was not propounded as testamentary.—*Held*, that this memorandum of the testator did not amount to a discharge of either of the debts.

Scemle.—The cases in which the Court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, are—

1. Where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor.
2. Where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having, in the event, been performed.
3. Where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under his own disposition, take or represent his interest upon his death, and relied upon their fulfilment of his intention; and,
4. (in strictness belonging to another class of cases), where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one in loco parentis, or is part of a family arrangement.

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The words "not to be enforced" being written across in the margin opposite the memorandum. The Master also found that *T. W. S. Hains*, a son of the Defendant *J. D. Hains*, deposed that the testator frequently told him that he intended to discharge *J. D. Hains* from any debt or sum of money that might be due from such Defendant to the testator; and that in case *J. D. Hains* should survive him, such debt or sum of money should be forgiven, and that he should never be called upon to pay any such debt, or that the testator used expressions to the like purport or effect; and that *J. D. Hains* submitted, that under these circumstances the testator intended to release him from the payment of any debt or debts due to the testator.

The Defendant, *J. D. Hains*, was the brother of the testator, and was also a legatee under his will. The will was dated in 1836, and the testator died in 1840. *J. D. Hains* had paid the interest upon the sums of 550*l.* and 100*l.* up to 1846, from which time the report had found the interest to be due.

Argument.

Mr. *Willcock*, and Mr. *F. T. White*, for the Plaintiffs, cited *Cross v. Sprigg* (a), *Eden v. Smyth* (b), *Reeves v. Brymer* (c), and *Wekett v. Raby* (d).

Mr. *Hetherington*, and Mr. *Bilton*, for the residuary legatees, cited *Byrn v. Godfrey* (e).

Mr. *Chandless*, and Mr. *Eddis*, for the Defendant *J. D. Hains*, cited *Foster v. Dawber* (f), *Aston v. Pye* (g), and *Flower v. Marten* (h).

(a) 6 Hare, 552.
 (b) 5 Ves. 341.
 (c) 6 Ves. 516.
 (d) 12 Bro. P. C. 386, Toml.
 edit.

(e) 4 Ves. 6.
 (f) 6 Exch. 839.
 (g) 5 Ves. 350, n. ; Id. 354.
 (h) 2 Myl. & Cr. 459.

[VICE-CHANCELLOR:—The Court in that case held the bond to have been always, from the beginning, a conditional bond; that it never had full force as a bond, and therefore, that it ought not to be enforced. The question there was, not whether an obligation ought to be set aside, but whether there was any enforceable obligation. Here the debtor, whose debt was constituted by two instruments dated respectively in 1834 and 1836, went on paying interest down to the death of the testator in 1840, and from that time up to April, 1846. Is it not difficult to say, after this, that these debts are released ?]

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The evidence of the intention of the testator not to sue upon these securities is sufficient to satisfy any reasonable mind. It may be, that the executors in whose possession the books of the testator were, ought to have propounded the document directing the instruments not to be enforced, as a testamentary paper; but, whether it be or be not of a testamentary character, it at least expresses the undoubted intentions of the testator: and, although the evidence of intention may not be sufficient at law to support the plea of a release, yet in equity the parties claiming the residue will not be permitted to avail themselves of the testator's bounty, and yet defeat his intentions as to the Defendant *J. D. Hains*. The Court will work out the equity of that Defendant by imposing upon the other parties the necessity either of fulfilling the testator's intentions, or giving up their own interests under the will pro tanto. The Master's report shews that there were no debts of the testator outstanding, and the executors therefore only represent legatees, and have no interests to protect but that of legatees, who are all equitably bound to carry into effect the testator's design.

VICE-CHANCELLOR :—

I should have taken time to consider my judgment in

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—
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this case, if it had not happened that I have recently had occasion to consider the authorities on the subject, which are all, moreover, reviewed in *Cross v. Sprigg* (a). The authorities amount to this, that a person found to be a debtor in the administration of an estate in this Court, and seeking to be relieved from the debt on the ground that some act of the deceased creditor, voluntary or otherwise, has put an end to his liability, must claim that relief in one of two ways,—either the act upon which he relies must be one which would have entitled him to relief in this Court as against the creditor himself in respect of the debt, or it must be such as will operate as a release of the debt in a Court of law. I think there is nothing in the evidence in this case which shews that the debtor has been discharged from these debts in either mode.

It was then contended, as it has been in several recent cases, that it is inequitable that parties should take property of the testator under his will, and yet refuse to effectuate other parts of his intention; although such intention be not expressed in his will, but manifested by some other acts, instruments, or declarations. The answer to this is, that there is no case in which a person is obliged in equity to carry out such intention, not being testamentary, or imposed as a matter of trust, unless the person to be so charged has been instrumental in causing the testator to omit from his will a formal direction providing for its fulfilment. This subject was discussed in the case of *Briggs v. Penny* (b), in which it was found that there was no evidence to fix the executrix, Miss Penny, with any knowledge of the charitable trusts which were supposed to have been intended. If it could have been shewn that she had had a knowledge of the informal papers referred to in

(a) 6 Hare, 555 et seq.

(b) 3 M.N. & G. 546.

the proceedings in that cause, that alone might have been relied upon to bring her into the position of a trustee.

In the present case there is certainly no release at law as to the debt secured under seal; and as to the debt not under seal, it must be observed that the testator, on the face of the very entry in his book which is relied upon as a discharge, considered the whole as one debt. He makes one sum of that which was due on the note, and that due on the mortgage; he classes them both together, and he certainly did not intend to release the one without releasing the other. But the words "not to be enforced," do not express an intention at once to discharge *J. D. Hains* from the debt; but they, on the contrary, assume the securities to be valid and continuing, and capable of being enforced. The doctrine of Lord *Alvanley* in *Reeves v. Brymer* (a) is, that you cannot rely on the expression of an intention to do something in future, but you must find words or acts which are sufficient to operate as an actual release, or which afford evidence to go to a jury that a release has been executed. *Aston v. Pye* (b) goes, I think, to the utmost limit in favour of the release. The words were not as here, "not to be enforced," but the testator had written a memorandum in these words—"Pye pays no interest, nor shall I ever take the principal except greatly distressed." The Court of law first sent it to the Ecclesiastical Court to know whether that was or not a testamentary paper; and then, the Ecclesiastical Court declining to give probate of it, it came back for the decision of the Court of law, and they construed it as being, under the circumstances, an actual discharge. They construed it as saying, "I discharge you on condition I am never myself distressed;" and since he never became distressed but died in affluent circumstances, they held the condition performed, and that the executors were not entitled

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(a) 6 Ves. 516.

(b) 5 Ves. 350, n.

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to recover. That case, however, went very far, and it was not approved of by Lord *Rosslyn* (a). Here neither the expression "not to be enforced," nor the acts of the testator, can be construed as amounting to an immediate or actual discharge. In *Aston v. Pye* no interest was taken; but in this case interest on the promissory note as well as on the mortgage debt was regularly paid by the debtor and received by the testator several years after the date of the entry and down to the time of his death; and the note remains uncanceled. How can I then hold that the words "not to be enforced," have any other effect than their testamentary effect, whatever that might be.

With regard to the testamentary force of this memorandum, it may, perhaps, after the decision of the Ecclesiastical Court in *Aston v. Pye*, be doubted whether it would be admitted to probate (b); but it is too much to say, after so many years have elapsed,—the testator dying in 1840 and interest on the debt having been paid until 1846,—that I am now to put it to the executors to propound this memorandum for probate as a testamentary paper. I think the Defendant *J. D. Hains* should have an opportunity of propounding it if he thinks proper, and the cause may stand over to enable him to make an application to the Ecclesiastical Court.

I have omitted to notice the case cited from the *Exchequer* (c); but that case comes within the rule I have mentioned: there was distinct evidence of an immediate discharge.

(a) Vide 5 Ves. 354.

(c) *Foster v. Dawber*, 6 Exch -

(b) Vide Id. 354, per Lord 839.

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WIGAN *v.* ROWLAND.

May 27th.

THE bill, which was brought to administer the estate of *John Rowland*, deceased, prayed that it might be declared that a legacy of 200*l.*, bequeathed to the Defendant *Elizabeth Wigan* by the will of the testator, was null and void, by reason of the Defendant, *Charles Wigan*, having attested the will.

Where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, the Court held that the signature of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen; and that the legacy to the wife of one of them failed, under the stat. 7 W. 4 & 1 V. c. 26, s. 15.

The will was dated in 1843, and was therefore made since the stat. 7 Will. 4 & 1 Vict. c. 26, which, by section 15, enacts, "That, if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

The form of the attestation was as follows:—

<p>"Signed and published by the said testator as his last will and testament, in the presence of us, who in his presence, and at his request, have hereunto subscribed our names.</p> <p>William Jones, of Rhuabon, his William Williams, his</p> <p>Witness. { Charles Wigan, William Rowland.</p>	<p>} John Rowland.</p> <p>x mark.</p> <p>x mark.</p>
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Judgment.

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(a) Vide 5 Ves. 354.

(c) *Foster v. Dauber*, 6 Exch—

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1853.

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The will was dated in 1843, and was therefore made since the stat. 7 Will. 4 & 1 Vict. c. 26, which, by section 15, enacts, "That, if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

The form of the attestation was as follows:—

"Signed and published by the said testator as his last will and testament, in the presence of us, who in his presence, and at his request, have hereunto subscribed our names.		} John Rowland.
William Jones, of × mark. Rhuabon, his		
William Williams, his × mark.		
Witness.	{ Charles Wigan, William Rowland.	

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Probate had been granted by the Ecclesiastical Court on the affidavit of *William Rowland*, whose deposition was in the usual form of that by an attesting witness.

At the hearing of the cause the original will was produced, and evidence was tendered to shew that the will was signed by *Charles Wigan*, not as himself attesting the execution of the will, but as verifying the attestation of the marksmen, *Jones* and *Williams*, who were, it was said, in truth the attesting witnesses. In order to shew the intention with which *Charles Wigan's* signature was affixed, evidence was produced, that, in cases in which he was acting as agent for a third party, he had frequently verified in like manner the marks of illiterate persons. It was averred in the bill, and on the part of the Plaintiffs evidence was tendered, that "the will was duly signed and published in the presence of *William Jones*, *William Williams*, and of the said Defendants, *Charles Wigan* and *William Rowland*; and, the said *William Jones* and *William Williams* having set their marks to the said will as witnesses, the said testator immediately afterwards said to the said Defendants *Charles Wigan* and *William Rowland*, "*Charles and William, sign it, it will make it safer,*" or words to that effect; and the said Defendants, *Charles Wigan* and *William Rowland*, accordingly subscribed their names to the said will, under the marks of the said *William Jones* and *William Williams*, immediately after such marks had been affixed, and in the presence of the said testator, and of the said *William Jones* and *William Williams*.

On the part of the Defendants *Wigan* and his wife, affidavits were produced, to the effect that the testator had procured two labourers (*Jones* and *Williams*), to attest his will; that several members of the testator's family were present; and that *Rowland*, who acted as attorney on the

occasion, had suggested the propriety of some of the persons present adding their signatures to attest the marks of the two witnesses; whereupon he (*Rowland*) and *Charles Wigan*, after *Jones* and *Williams* had left the room, signed their names accordingly.

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Mr. *Bacon* and Mr. *Freeling* for the Plaintiffs.

Argument.

Mr. *Rolt* and Mr. *Kenyon* for the Defendants.

The case of *Doe* d. *Burdett* (a) was cited.

The VICE-CHANCELLOR held, that, upon the face of the document and of the attestation clause, the Defendant *Wigan* must be held to be a witness to all that that clause contained; and that, although it was a hard case, the legacy to his wife must fail. His Honor thought, that, even if the parol evidence were admissible, it would not be of sufficient force to countervail that which the written document afforded.

Judgment.

(a) 4 Ad. & E. 1.

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The testator, at the time of his death, had about 3000*l.* in the hands of his bankers, and the executors paid some moneys, which they received on account of the estate, to their account at the same bank, and drew out such sums as they required.

About nine months after the death of the testator, the bankers became bankrupt, having, at that time, a balance of about 2000*l.* belonging to the estate in their hands, of which 1000*l.* was ultimately lost by the bankruptcy. The Master, on a reference, thereupon found "That there were not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it, with the bankers;" but the Court held that they were not answerable for the loss.

BY the decree in this cause, dated the 28th of July, 1848, it was referred to the Master, to inquire whether any and what sums or sum of money belonging to the testator's estate were or was left or placed, and when and under what circumstances, by the Defendants *F. Newton, G. Ridge, and J. Hemingway*, or any or either and which of them, in the bank of Messrs. *Parker, Shore, & Co.*, at the respective times of the death of the testator and of the bankruptcy of Messrs. *Parker, Shore, & Co.*, respectively; and whether any and what loss occurred in respect thereof, and under what circumstances.

The Master, by his report, dated the 28th of October 1852, found that the testator died in May, 1842; that in his lifetime he employed the said *Parker, Shore, & Co.*, as his bankers; that for five years previous to his decease he had generally a cash balance in their hands exceeding 3300*l.*, and that at the time of his death there was a balance of 3243*l.* 12*s.* in the hands of the said *Parker, Shore, & Co.*, belonging to his estate: that the testator's property in money, which was immediately available to his executors for the purposes of his will, at the time of his death, or within a very short time afterwards, amounted to 6642*l.* 7*s.* 6*d.*, and consisted of the said balance and the several particulars following, viz. in cash in the testator's house at time of his death 105*l.*; a cash balance of 3027*l.* 15*s.* 6*d.* remaining in the bank of the *Sheffield Banking Company* on a deposit note; a debt of 20*l.* due from *John Raywood*, and received by the executors on the 20th of August, 1842; the sum of 225*l.*, the produce of the sale of ten shares in the *Sheffield Fire Office*, sold by the executors

on the 16th of August, 1842; and 21*l.*, the produce of the sale of five shares in the *Sheffield* Bath Company, sold by the executors on the 4th of October, 1842: that the Defendants *F. Newton*, *G. Ridge*, and *J. Hemingway* also received, for rents and profits of the testator's freehold and leasehold estates, between the day of his death and the 6th of January, 1843, 222*l.* 16*s.* 4*d.*, making, with the said 6642*l.* 7*s.* 6*d.*, the aggregate sum of 6865*l.* 3*s.* 10*d.*, which was available for the purposes of the testator's will at the time hereinbefore mentioned. And he found that the testator, by his will, directed his executors and trustees (the said Defendants *F. Newton*, *G. Ridge*, and *J. Hemingway*) to sell all his real estates as soon as conveniently might be after his decease, and to convert, with all convenient speed, his leasehold and other personal estate (except such parts thereof as were specifically bequeathed) into money, and out of the proceeds of his said real and personal estates to pay his debts, funeral and testamentary expenses, and then to pay the several charitable legacies therein mentioned, amounting together to 600*l.*; then to purchase 3333*l.* 6*s.* 8*d.* 3*l.* per cent. Consolidated Annuities, to answer the annuity of 100*l.* bequeathed to his wife, the Defendant *Ann Vickers*, and then to pay two legacies of 100*l.* each to *John Raywood* and *Sarah Firth*, and to divide the residue of the said trust moneys (including the said 3333*l.* 6*s.* 8*d.* after the trusts thereof had been satisfied,) equally among all his nephews and nieces, the children of his deceased sisters *Mary*, *Elizabeth*, and *Hannah*, who should be living at his death: that the testator gave to his said executors and trustees legacies of 10*l.* each, but without directing any particular time for their payment; and that the only debts which were owing by the testator at the time of his death consisted of tradesmen's and other bills, amounting altogether to 72*l.* 3*s.* 3*d.*; of servants' wages, amounting to 3*l.* 9*s.* 6*d.*; and of rates

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and taxes, amounting to 1*l.* 9*s.* 7*d.* And he found that the said servants' wages were paid by the said executors in the month of June, 1842; that the rates and taxes were paid by them in the month of September, 1842; and that of the said tradesmen's and other bills, the sum of 39*l.* 6*s.* 9*d.*, part thereof, was paid by the executors previous to the 10th of January, 1843, and 32*l.* 16*s.* 6*d.*, the residue, subsequently thereto; that the testator's funeral expenses amounted altogether to 80*l.* 16*s.* 2*d.*, of which 68*l.* 14*s.* 3*d.* was paid by the executors previous to the 10th of January, 1843, and 12*l.* 1*s.* 11*d.*, the residue, subsequently thereto; that the testamentary expenses of the testator (including therein the costs and expenses of the probate of his will) amounted altogether to 787*l.* 3*s.* 6*d.*, of which 232*l.* 8*s.* 11*d.* was incurred and was paid previous to the 10th of January, 1843, and 554*l.* 14*s.* 7*d.* was incurred and was paid subsequently; that the said charitable legacies, amounting to the sum of 600*l.*, were all paid by the executors to the parties entitled thereto in the months of August and September, 1842; that the said 333*l.* 6*s.* 8*d.* Bank 3*l.* per Cent. Annuities were purchased by them on or about the 18th of August, 1842; that the said legacies of 100*l.* each to *John Raywood* and *Sarah Firth* were paid on or about the 20th of August, 1842; and that the legacies of 10*l.* each to the executors were paid or retained by them on or about the 11th of July, 1844. And he found that the Defendants *F. Newton*, *G. Ridge*, and *J. Hemingway*, as such executors as aforesaid, on the 24th of May, 1842, paid to *Parker, Shore, & Co.*, 75*l.*, part of 105*l.* cash found in the testator's house at the time of his decease, and on the 16th of August, 1842, they paid in a further sum of 225*l.*, being the produce of the sale of the said four *Sheffield* Canal shares; and that between the 6th of July, 1842, and the 6th of January, 1843, the Defendants (the executors) drew out from time to time, for the purposes of their trust, various sums of money, amounting

in the whole to 1537*l.* 12*s.* 10*d.*, leaving a balance (including interest allowed, and after deducting commission charged by the said bankers) of 2056*l.* 17*s.* 11*d.* due to the testator's estate in the hands of *Parker, Shore, & Co.* And he found, that, on the 10th of January, 1843, *Parker, Shore, & Co.* became bankrupt, there then being in their hands the said balance or sum of 2056*l.* 17*s.* 11*d.*, belonging to the testator's estate; and that four several sums of 511*l.* 14*s.* 5*d.*, 255*l.* 17*s.* 3*d.*, 153*l.* 10*s.* 4*d.*, and 102*l.* 6*s.* 3*d.*, making together the sum of 1023*l.* 8*s.* 3*d.*, had since been received by the Defendants *F. Newton, G. Ridge, and J. Hemingway*, for dividends in respect of the said sum of 2056*l.* 17*s.* 11*d.* under the said bankruptcy, and for which they had duly accounted as part of the said testator's estate, by which payments the said balance or sum of 2056*l.* 17*s.* 11*d.* was reduced to the sum of 1033*l.* 9*s.* 8*d.*, which, subject to any further dividends that might be paid under the said bankruptcy, had been lost to the testator's estate thereby. And he found that the said several sums received by the Defendants *F. Newton, G. Ridge, and J. Hemingway*, on account of the testator's estate, between the time of his death and the bankruptcy of *Parker, Shore, & Co.*, amounted to 5159*l.* 4*s.* 8*d.*, and consisted of the following particulars, viz. cash found in the testator's house at the time of his death, 105*l.*; cash at his banker's, the *Sheffield Banking Company*, on a deposit note, 3027*l.* 15*s.* 6*d.*; cash of *Parker, Shore, & Co.*, in various cheques, being part of the said balance of 3243*l.* 12*s.* in their hands at the testator's decease, 1537*l.* 12*s.* 10*d.*; rents of the testator's estates due at his death and becoming due afterwards, 222*l.* 16*s.* 4*d.*; cash, being the produce of ten shares in the *Sheffield Fire Office*, and five shares in the *Sheffield Bath Company*, sold by the said Defendants (the executors), 246*l.*; and a debt due to the testator from *John Raywood*, 20*l.* And he found that the several sums paid by the said Defendants on ac-

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count of the testator's estate between the time of his death and the bankruptcy of *Parker, Shore, & Co.*, amounted to 4961*l.* 1*s.* 6*d.*, and consisted of the particulars following, viz. on account of debts due from the testator at his death, 39*l.* 6*s.* 9*d.*; on account of funeral expenses, 68*l.* 14*s.* 3*d.*; for probate of will, and on account of testamentary expenses, 232*l.* 8*s.* 11*d.*; for ground rents, rates, and taxes, 109*l.* 7*s.* 1*d.*; for servants' wages after testator's death, 43*l.* 14*s.* 6*d.*; for pecuniary legacies, 800*l.*; invested in the purchase of 3333*l.* 6*s.* 8*d.* Bank 3*l.* per Cent. Annuities, to answer the annuity of 100*l.*, 3025*l.*; proportionate part of the said annuity until such investment was made, 12*l.* 10*s.*; to the residuary legatees, on account of their shares of the residue, 330*l.*; to *Parker, Shore, & Co.*, bankers, to the credit of the testator's estate, 300*l.* And found that by such payments the said 5159*l.* 4*s.* 8*d.* was reduced to the sum of 198*l.* 3*s.* 2*d.*, which constituted a cash balance in the hands of the Defendants, the executors, exclusive of the sum of 2056*l.* 17*s.* 11*d.* cash, which then still remained in the hands of *Parker, Shore, & Co.* And he found that by such payments all the sums specifically bequeathed or directed to be paid by the testator's will, and to which his estate was liable previous to the division of his residuary real and personal estates among his nephews and nieces, were discharged and satisfied, except the following, viz. the sum of 32*l.* 16*s.* 6*d.* of testator's debts due at his decease, the sum of 12*l.* 1*s.* 11*d.* of his funeral expenses, and the sum of 30*l.* of his pecuniary legacies; and that the said cash balance of 198*l.* 3*s.* 2*d.* in the hands of the Defendants the executors was more than sufficient to meet such unpaid debts, expenses, and legacies, without having recourse to the said balance of 2056*l.* 17*s.* 11*d.* then still remaining in the hands of *Parker, Shore, & Co.* And he found that the defendants, the executors, were liable, as such executors, to the payment of a ground rent of 30*l.* per annum in respect of part of the leasehold estate

of the testator, and that they were also liable to the performance of a covenant entered into by the testator to expend the sum of 500*l.* in building upon other part of his leasehold estate; and that the only other payments for which it was then necessary for the said executors to provide out of the testator's estate were the rents, rates, taxes, repairs, and other outgoings of his several estates until sold, and the legacy duty and current expenses of the executorship and of selling the said estates as directed by the testator's will, none of which estates had then been sold; and that such rents, rates, taxes, repairs, and other outgoings, including the ground rent of 30*l.*, amounted, up to the time of the sale of the estates, to 173*l.* 10*s.* 1*d.*, and that the legacy duty and current expenses of the executorship and of selling the estates amounted to 554*l.* 14*s.* 7*d.*, making together 728*l.* 4*s.* 8*d.*; and that the accruing rents of the said estates to the time of sale and the monies arising from the sale thereof, and of the testator's household furniture and effects and other property which then still remained unsold, were much more than sufficient to pay the 728*l.* 4*s.* 8*d.*, inasmuch as that the Defendants, the executors, received from those and other sources, on account of the testator's estate after the bankruptcy of *Parker, Shore, & Co.*, various sums amounting together to 8428*l.* 19*s.* 4*d.*, consisting of the particulars following, viz. for rents of estates until sold, 131*l.* 2*s.* 4*d.*; for household furniture, horse, carriage, working-tools, and plate sold, 256*l.* 13*s.* 1*d.*; for *Sheffield* Canal shares, and five *Sheffield* Botanical Garden shares sold, 107*l.* 10*s.*; for freehold and leasehold estates sold, including interest on the purchase moneys up to the time of completion, 7852*l.* 9*s.*; for interest received of the residuary legatees on advances made to them on account of their shares of the residue, 64*l.* 10*s.* 7*d.*; and for interest allowed by the *Sheffield & Hallamshire* Banking Company on money deposited in their hands by the executors, 16*l.* 14*s.* 4*d.* He found that, during the time the Defendants,

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the executors and trustees, allowed the said 2056*l.* 17*s.* 11*d.* to remain in the hands of *Parker, Shore, & Co.*, there were not any purposes of their trust which rendered it necessary to retain the said balance, or any part of it, with the said bankers. And the Master found, that, upon consideration of the matters aforesaid, the sums of money thereafter mentioned belonging to the testator's estate were left or placed by the Defendants, *F. Newton, G. Ridge, and J. Hemingway* in the bank of *Parker, Shore, & Co.*, at the respective times of the death of the testator and of the bankruptcy of the said *Parker, Shore, & Co.*; and that they were so left and placed at or during the times and under the circumstances thereinbefore particularly mentioned, viz. at the time of the death of the testator, the balance or sum of 3243*l.* 12*s.*, and at the time of the bankruptcy of the said *Parker, Shore, & Co.* the balance or sum of 2056*l.* 17*s.* 11*d.*; and he found that a loss of the sum of 1033*l.* 9*s.* 8*d.* had occurred to the testator's estate in respect thereof, under the circumstances thereinbefore mentioned (subject nevertheless to such loss being reduced by the payment of any further dividend out of the estate of the said Messrs. *Parker, Shore, & Co.* respectively).

Argument.

Mr. *Willcock*, and Mr. *W. Forster*, for some of the residuary legatees, contended, that the loss occasioned to the estate by the bankruptcy of *Parker, Shore, & Co.* ought to be made good by the executors personally, on the ground that they, having no purposes of the trust to satisfy, ought not to have left the balance of 2056*l.* in their hands, but should either have paid it over to the residuary legatees, or invested it in some sufficient manner, by which interest would have been produced. In *Bailey v. Gould* (a), *Alderson, B.*, says, "As personal security changes in value from day to day, by reason of the personal responsibility of the party giving it, and

(a) 4 Y. & C. 221.

as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who omits to get it in within a reasonable time becomes himself the security" (a); *Clough v. Bond* (b). [VICE-CHANCELLOR.—That case goes on an entirely different principle. Placing the money of the cestui que trust under the control of an entire stranger, is a very different thing from leaving money of the testator in the hands of his bankers, where they found it.] We submit, the case is substantially the same, whether the executors leave money in private hands without necessity, or whether they put it in such hands as in that case: *Challen v. Shippam* (c), *Moyle v. Moyle* (d).

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Mr. *Torriano* for other residuary legatees.

VICE-CHANCELLOR.—Without calling upon the counsel for the executors:—

Judgment.
—

No case has been cited in the argument, nor do I know of any case, in which executors, who have merely left moneys belonging to the estate in the hands of the bankers of the testator, for a period of no more than nine months after his decease, have been held liable to make good the fund lost by the failure of the bankers. The executors are no doubt bound to exercise their judgment on the safety of the place of deposit, whether it be that which the testator had in his lifetime chosen, or whether it be selected by themselves; and when a loss unfortunately happens, the question must always be, how far the executors must be held to be answerable under the circumstances of the case. Now, what are the trusts and duties of the executors? They have first to pay the debts; secondly, the legacies;

(a) 4 Y. & C. 226.

(c) 4 Hare, 555.

(b) 3 Myl. & Cr. 490, 495, 496.

(d) 2 Russ. & Myl. 710.

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SIDEBOTHAM v. WATSON.

A legacy of a sum of money owing to the testator by A. B., upon a mortgage of certain premises therein mentioned, and which mortgage was paid off in the testator's lifetime, after the date of the will, held to be a specific and not a merely demonstrative legacy, and to be adeemed by such payments.

The testator placed part of the mortgage-money received by him from A. B. in a bank, and afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance, amounting to a moiety of the sum which had constituted the

A SPECIAL CASE.—*R. Orme*, by his will, dated in 1844, bequeathed as follows:—

“I give and bequeath unto my wife, *Mary Ann Orme*, all my household goods and furniture, plate, linen, china, beds and bedding, and the sum of 100*l.*, and also the sum of 500*l.* owing to me by Mr. *Robert Leuh* upon a mortgage of a public house and premises situate on *Shaw Heath* within *Stockport* aforesaid, and the interest due thereon at the time of my decease.” The testator then devised certain messuages to his wife in fee, bequeathed a small legacy, and gave the sum of 10*l.* each to his friends, *Thomas Sidebotham* and *Thomas Royle*, whom he thereafter appointed executors of his will, as an acknowledgment for their trouble in and about the execution of the trusts thereof; and he then gave and devised unto the said *Thomas Sidebotham* and *Thomas Royle* several messuages in *Stockport*, upon trust to let and manage the same and apply the rents and profits in the maintenance of the two sons of his (the testator's) sister, until they attained twenty-one years of age, and then to sell and divide the proceeds between the said sons as therein mentioned; and he also gave to the same two trustees, *Sidebotham* and *Royle*, the sum of 500*l.* upon trust to invest the same for the benefit of his wife *Mary Ann Orme*, for her life, and after her decease to be divided amongst her mother, brother, and sisters, and the said sons of his deceased sister. The testator then devised and be-

queathed the mortgage debt; but it was held, that the specific legatee of the mortgage debt was not entitled in respect of such legacy to the money so remaining in the bank.

The testator gave his property to *C.* and *D.* upon various trusts, and, among others, upon trust for sale, and empowered *C.* and *D.*, and the survivor of them, his heirs, executors, &c., to give receipts for the purchase-money, and concluded by appointing his wife and *C.* and *D.* “trustees and executors” of his will:—*Held*, that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with *C.* and *D.* under the specific trusts of the will.

about 550*l.*; and there were, at the time of the failure of the bankers, three or four months yet remaining of the time which the law allows to the executor to wind up the testator's estate. Executors cannot, in the nature of things, be supposed to be acquainted with all possible debts of the testator which may appear; and I do not think that in this case they were bound to have distributed the balance of the estate, or to have removed it from the bank, before the time of the bankruptcy. In *Challen v. Shippam* (a), the money was clearly misappropriated. The trustee had given directions that it should be invested according to the desire of the cestui que trust, and he had omitted to take the slightest precaution to see that his directions had been obeyed. In the case of *Clough v. Bond* (b), there was nothing to justify the trustee in placing the fund in the hands of a stranger. It is nothing like the case of money being left in a bank, its ordinary place of temporary deposit. The case of *Moyle v. Moyle* (c) is very strong, and it was a hard case upon the executors, but it was very different from the circumstances here.

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It is not always easy now to procure competent and substantial persons to undertake the office of executor; but I think if the Court should hold parties in that situation to be liable for losses occurring under circumstances like the present, it would become impossible to find proper persons to accept the duty.

(a) 4 Hare, 555.

(b) 3 Myl. & Cr. 490.

(c) 2 Russ. & Myl. 710.

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SIDEBOTHAM v. WATSON.

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The testator placed part of the mortgage-money received by him from *A. B.* in a bank, and afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance, amounting to a moiety of the sum which had constituted the

mortgage debt; but it was held, that the specific legatee of the mortgage debt was not entitled in respect of such legacy to the money so remaining in the bank.

The testator gave his property to *C.* and *D.* upon various trusts, and, among others, upon trust for sale, and empowered *C.* and *D.*, and the survivor of them, his heirs, executors, &c., to give receipts for the purchase-money, and concluded by appointing his wife and *C.* and *D.* "trustees and executors" of his will:—*Held*, that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with *C.* and *D.* under the specific trusts of the will.

A SPECIAL CASE.—*R. Orme*, by his will, dated in 1844, bequeathed as follows:—

"I give and bequeath unto my wife, *Mary Ann Orme*, all my household goods and furniture, plate, linen, china, beds and bedding, and the sum of 100*l.*, and also the sum of 500*l.* owing to me by *Mr. Robert Leah* upon a mortgage of a public house and premises situate on *Shaw Heath* within *Stockport* aforesaid, and the interest due thereon at the time of my decease." The testator then devised certain messuages to his wife in fee, bequeathed a small legacy, and gave the sum of 10*l.* each to his friends, *Thomas Sidebotham* and *Thomas Royle*, whom he thereafter appointed executors of his will, as an acknowledgment for their trouble in and about the execution of the trusts thereof; and he then gave and devised unto the said *Thomas Sidebotham* and *Thomas Royle* several messuages in *Stockport*, upon trust to let and manage the same and apply the rents and profits in the maintenance of the two sons of his (the testator's) sister, until they attained twenty-one years of age, and then to sell and divide the proceeds between the said sons as therein mentioned; and he also gave to the same two trustees, *Sidebotham* and *Royle*, the sum of 500*l.* upon trust to invest the same for the benefit of his wife *Mary Ann Orme*, for her life, and after her decease to be divided amongst her mother, brother, and sisters, and the said sons of his deceased sister. The testator then devised and be-

queathed all his residuary estate to the same trustees, *Sidebotham* and *Royle*, upon trust to dispose of and divide the same equally amongst his wife, mother, brother, sisters, and said sons of his deceased sister, who should be living at his (the testator's) decease; and after devising to his said trustees, *Sidebotham* and *Royle*, all real estates vested in him as trustee or mortgagee, subject to the equities affecting the same, and empowering his said trustees and the survivor of them, and the heirs, executors, administrators, or assigns of such survivor, to give receipts to purchasers for all moneys or effects to be paid or delivered to them by virtue of that his will, he concluded, "And I appoint my said wife and the said *T. Sidebotham* and *T. Royle* to be trustees and executors of this my will."

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The said testator died in 1850, leaving his said wife *Mary Ann* surviving. The will was proved by her and *Sidebotham* and *Royle*.

Subsequently to the date and execution of the will, *Robert Leah's* mortgage debt of 500*l.* was paid to the testator by a third party, to whom the testator transferred the mortgage; and the testator thereupon placed to his own credit in account with the district bank at *Stockport*, the sum of 350*l.*, part of the moneys so received by him in respect of *Robert Leah's* mortgage debt, and retained in his own hands the surplus or balance of such moneys for his immediate use in his trade or business. The testator subsequently drew out of the said bank divers portions of the sum of 350*l.* to the amount of 100*l.* in the whole. And at the time of his decease the sum of 250*l.*, the residue or balance thereof, stood to his credit at the said bank, and so continued until the same was received by the said testator's widow. At the time of the testator's death, nothing was due to him from *Robert Leah* for principal or interest in respect of the mortgage debt of 500*l.* Soon after

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the will had been proved, the testator's widow claimed payment out of the testator's assets, not only of the said legacy of 100*l.*, but also of the amount of the mortgage debt of 500*l.* so bequeathed to her; and the said sum of 250*l.*, being the residue or balance of the mortgage debt so received by the said testator, and which continued standing to his credit at the said bank, was accordingly got in and received by her for her own use on account of the two last-mentioned legacies.

The testator's widow intermarried with the Defendant *C. Watson*. At the time of the testator's decease, the principal sum of 350*l.* was due to him from one *John Newton* on the security of a mortgage, which, in March, 1852, was redeemed by payment to the said plaintiff of the sum of 351*l.* 18*s.* 2*d.* for principal and interest; and this sum having been claimed by the Defendants in further satisfaction of the said legacies to the testator's widow, the Plaintiff paid to *C. Watson* in right of his said wife the said sum of 351*l.* 18*s.* 2*d.* Doubts arising upon the propriety of this payment, it was afterwards agreed that 100*l.*, part thereof, should be retained by the Defendants, *Watson* and his wife, in satisfaction of her legacy of 100*l.*; and that 250*l.*, other part thereof, should be transferred into the joint names of the Plaintiff and Mrs. *Watson*, to abide the decision of the Court.

The following questions were submitted to the Court:

First. Whether or not the bequest by the testator to his said wife of the said *Robert Leah's* mortgage debt of 500*l.* was wholly, or to any and to what extent, adeemed?

Secondly. Whether or not the payment to or retainer by the testator's widow of the said sum of 250*l.*, the balance or residue of the moneys received by the said testator for and

in respect of the said *Robert Leah's* mortgage debt, and standing to the said testator's credit at the said bank at the time of his decease as aforesaid, was a good or valid payment, so far as the same hath a relation to the bequest mentioned in the preceding question?

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Thirdly. Whether or not the sum of 250*l.*, part of the said sum of 351*l.* 18*s.* 2*d.* mentioned in the said agreement, and transferred into the names of the said Plaintiff and the said Defendant *Mary Anne Watson*, ought to be refunded or restored to the said testator's estate?

Fourthly. Whether or not, according to the true construction of the said will, the trusts thereby declared of and concerning the property by the said testator devised and bequeathed to the said *Thomas Sidebotham* and *Thomas Royle* in trust, ought to be executed by the said Defendant, *Mary Anne Watson*, conjointly with the said Plaintiff?

Mr. *Prendergast*, for the Plaintiff, who represented the residuary estate of the testator; and Mr. *J. H. Palmer*, for the Defendant, the widow.

Argument.

[The authorities referred to are mentioned in the judgment.]

VICE-CHANCELLOR:—

The case of *Le Grice v. Finch* (a) is certainly the most favourable for the claim of the Defendants, but it is distinguishable from that before me. The testatrix there said, it was the wish of her mother and herself that the 500*l.*

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(a) 8 Mer. 50.

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they had then out upon mortgage should be given to the Plaintiff and her family in the manner thereafter mentioned, and then she bequeathed the said 500*l.* upon trust for the Plaintiff. The mortgage was afterwards called in. Sir *William Grant* carefully distinguishes the case from the gift of a particular debt. It was not the mortgage debt that was bequeathed, but the money which the testatrix and her mother at the time of the will had out. "The thing," he observes, "is not the mortgage, but the money"—the sum which belonged to her and her mother. The circumstance of its being on mortgage was accidental. "It was," he adds, "no ingredient in the gift by way of condition or inherent description." In this case, the last words make the difficulty. The existence of the debt must be regarded as a condition; it is part of the gift by inherent description. It appears to me impossible to say that this is not so.

In *Gillaume v. Adderley (a)*, the gift was of "5000*l.* sterling, or 50,000 current rupees," which the testator afterwards refers to as "the said sum of 5000*l.*, or 50,000 rupees, now vested in the Company's bonds;" and he goes on to direct that it shall be remitted to *England*, and invested in Government security. The testator, therefore, contemplates a change in the state of investment, and regards it as of no importance as affecting the right to the legacy. He speaks of the existing investment as merely accidental, and not as an ingredient of the gift by its inherent description.

In the case of *Chaworth v. Beech (b)*, where the legacy was held to be specific, the testator, after reciting his possession of the promissory note for 8000*l.*, says: "Now I give and bequeath unto *Sarah Hawksley*," "the before-

() 15 Ves. 384.

(b) 4 Ves. 555.

mentioned sum of 8000*l.*," "with the note," and so on, referring to other portions of the will as to which no question arose. I do not know how to make any substantial distinction between that gift and the one now before me. Again, in the case of *Innes v. Johnson* (a), the Master of the Rolls held, that the gift of "300*l.* upon bond," there being a bond of that amount belonging to the testator, must be regarded as specific. It is important to save whole the principle which distinguishes a bequest of this nature from a demonstrative legacy.

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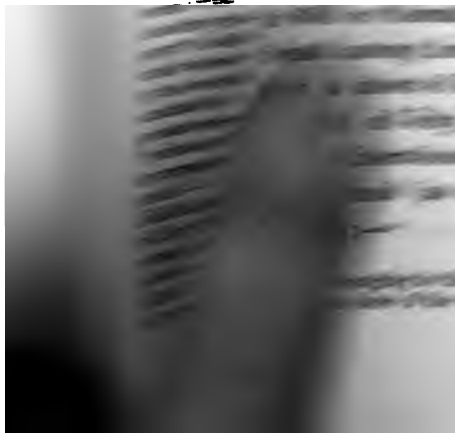
It was argued, that, if the security by way of mortgage had been merely converted into a bond debt, there would have been no ground for insisting upon the ademption. It is not necessary that I should decide that point. It is at least an arguable one. It is sufficient to say, that the thing inherently described by the terms of the bequest cannot be found at the death of the testator. There was nothing in existence corresponding with the gift of the sum of money "owing to the testator by Mr. *Leah* upon a mortgage of a public-house," the sum of 500*l.*, which had been so owing, having been paid off in the lifetime of the testator; and it is impossible, therefore, that the bequest can take effect.

It was then said, that the 250*l.* remaining in the *Stockport* Bank, which was part of the money received by the testator in payment of the mortgage debt, was earmarked, and as to that sum, at least, the widow of the testator was entitled to take it as a part of her legacy still in existence. No authority, however, has been produced to shew, that, in a case like the present, when the debt, which is the subject of the gift, is paid off, the money can be followed into the hands of another party, merely because the testator has not spent it, and that therefore it ceases to be within

(a) 4 Ves. 568.

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and
correct copy of the original as
the same appears from the records of the

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JAN 10 1901
U. S. DEPT. OF AGRICULTURE
WASHINGTON, D. C.



THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and
correct copy of the original as
the same appears from the records of the

1

"I *Elizabeth Evans* of *Buckland Buntingford Hertfordshire* do hereby make and declare this my last will and testament and do hereby dispose of all my worldly effects First I give my plate watch writing-desk and clothes to my mother *Mrs. Sarah Evans* of *Buckland Buntingford Herts* for her sole use and benefit independent of her husband *Charles Evans* of the *Cape of Good Hope* And I do give bequeath and devise to my mother *Mrs. Evans* of *Buckland* aforesaid the interest arising from ^{400l.} ~~400l.~~ Stock New $3\frac{1}{2}$ per Cent. Bank Annuities standing in the books of the Bank of *England* in my name after my executor debts and funeral expenses are paid for the term of her natural life for her sole use and benefit independent of her husband *Charles Evans* aforesaid and the personal receipt of my mother is to be a sufficient discharge And I give bequeath and devise the ^{residue of my property} ~~said sum of 400l.~~ Stock New $3\frac{1}{2}$ per Cent. Bank Annuities unto the treasurer of the Church Missionary Society together with 600l. due to me at my mother's decease from my uncle *Mr. George Plomer Hamilton* of *Farnham Surrey* the same to be paid within twelve months after my mother's decease and held in trust by the said treasurer to be applied to the uses and purposes of that society and for which the receipt of such treasurer shall be a sufficient discharge And I give and bequeath to Mr. ^{*John Hemingway*} ~~*Richard Richards*~~ the sum of 120l. Stock $8\frac{1}{2}$ per Cent. of 23 ~~*Road Lane Fenchurch Street London*~~ and appoint him my sole executor to be received by him out of 400l. stock aforesaid and I appoint him my sole executor to carry the purposes of this my last

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will and testament into effect As witness my hand this
 sixteenth day of July in the year of Our Lord One thou-
 sand eight hundred and thirty-three

"ELIZABETH EVANS"

It was not known at what time the above obliterations
 and alterations were made.

John Hemingway, the executor, died in 1836, and the
 testatrix's mother, *Sarah Evans*, died in April, 1847. At
 the date of the will, only a sum of 400*l.* 3*l.* 10*s.* per cent.
 Stock was standing in the testatrix's name. The sum of
 600*l.* mentioned in the will as due to her at the death of
 her mother was a sum of stock, which she took under her
 grandfather's will, and in which her mother had a life in-
 terest. This sum was transferred to the testatrix after
 her mother's death, and formed part of the 1400*l.* 3*l.* 5*s.*
 per cent. Stock, the remainder of which was purchased
 at several times after the date of her will. The testa-
 trix's father, *Charles Evans*, was her sole next of kin at
 her death, and he was then residing at the *Cape of Good*
Hope. As no near relation of the testatrix was known to
 be living, the churchwardens of the parish of *Buckland*,
Buntingford, and a friend of the testatrix, took charge of
 her house, and of the property in it, and gave the necessary
 directions for her funeral; and when the above-mentioned
 will was found among her papers, notice of it was given to
 the Church Missionary Society, who thereupon, through
 their solicitors, took possession of the testatrix's property
 and ready money, and realised thereby a sum of 82*l.* or
 thereabouts. In the latter part of the year 1848, no steps
 having been taken by any person to prove the will or ad-
 minister the estate, *John Thornton*, the treasurer of the
 Church Missionary Society, applied for letters of adminis-
 tration with the will annexed, which led to the citation of
 the father, who subsequently appointed the Plaintiff his

attorney; and administration of the estate of the testatrix, with a fac simile of the will annexed, were by the decree of the Prerogative Court granted to the Plaintiff as such attorney.

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The special case stated, that the funded property of the testatrix was still standing in her name, with the dividends which had accrued since her death; and that the residuary property received by the Church Missionary Society was insufficient to discharge her funeral expenses and the costs of the suit.

The Church Missionary Society claimed to be entitled to the whole sum of 1400*l.* Stock, and to the dividends due thereon, and to all other the personal estate of the testatrix, subject to the payment of her funeral and testamentary expenses, and the costs of the suit in the Ecclesiastical Court, and the testatrix's debts, if any. *Charles Evans*, the father and sole next of kin of the testatrix, claimed to be entitled to all her funded property and personal estate, except the sum of 400*l.* 3*l.* 5*s.* per cent. Stock as answering the bequest contained in the will, as it originally stood, of 400*l.* Stock New 3½ per cents., to the treasurer of the Church Missionary Society; and he contended, that the legacy of 600*l.* to the treasurer of that society was adeemed, and that the debts and funeral and testamentary expenses ought to be paid out of the legacy of 400*l.* Stock; and the Plaintiff was advised that he could not safely administer the estate without obtaining the opinion and directions of the Court upon the following questions:—

1. Whether, according to the due construction of the above-mentioned will, it operated so as to pass the whole or any, and what part of the funded property and personal estate to the treasurer of the Church Missionary Society?
2. Whether *Elizabeth Evans* did or did not die intes-

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tate as to any and what part of her funded property and personal estate?

3. By whom and out of what funds the funeral and testamentary expenses of *Elizabeth Evans*, and the costs of the proceedings in the Ecclesiastical Court, and the costs of and incidental to this case, and the debts, if any, of the said testatrix were to be paid?

Argument.
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Mr. *Elmsley* and Mr. *T. Wright*, for the Plaintiff.

Mr. *Craig* and Mr. *Sidebottom*, for the Church Missionary Society.

Mr. *Eddis* for *Charles Evans*, the next of kin, argued, that the time when the alterations in the will were made being unknown, they must be presumed to have been made on the day on which the will bore date; and that there was, moreover, internal evidence that they were contemporaneous. [*Vice-Chancellor.* — The Ecclesiastical Court must have presumed that the alterations were made before the year 1838 (a), or they would not have given probate.] The language of the will must be applied to the state of the property of the testatrix at the time, and the residuary gift to the society is only an informal mode of expressing,—“the residue of my capital stock,”—that is, exclusive of the 600*l.* or of any subsequent acquisition. The testatrix had no intention to bequeath to the society any other property than that to which she specifically refers; and the 600*l.* having been subsequently got in before the legacy could take effect, fell into the general residue of the testatrix’s estate, as to which she died intestate. The effect of the gift of the 400*l.* stock “after the executor debts and funeral ex-

(a) See Wills Act, 7 Will. 4 & 1 Vict. c. 26, ss. 21, 34.

penses were paid," was also to exonerate the general residue, and throw those charges on the specific legacy: *Choat v. Yeats* (a), *Browne v. Groombridge* (b).

The case of *Hewett v. Snare* (c) was also referred to.

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Judgment.

VICE-CHANCELLOR:—

The case has been very ably argued by Mr. *Eddis* for the next of kin; but I think that, looking at the language used by the testatrix, and the rules of construction adopted in this Court, I must hold that the stock standing in the name of the testatrix at the time of her death passed to the treasurer of the Church Missionary Society. I am bound, where any balance of doubt arises, to lean rather in favour of testacy. It is not unnecessarily to be supposed, that this lady, making her will, intended to die intestate, at least as to any considerable portion of her estate,—I say any considerable portion, for as to the residue beyond the stock, of which the chief part of the estate consisted, I am compelled to conclude that there is an intestacy. The more reasonable construction of the words "residue of my property stock," seems to me to be as meaning "the residue of my property which consists of stock," and not "videlicet stock," referring to that species of property by way of example or illustration. In either of these constructions, however, the will would pass the whole of the $3\frac{1}{2}$ per cent. Bank Annuities, which the testatrix had at the time of her death. It would be unnecessary to consider how the stock was acquired. There is certainly the difficulty to which Mr. *Eddis* adverted. The stock is to be transferred to the legatee within twelve months after the mother's decease, by which, if the mother had survived the testatrix, there

(a) 1 J. & W. 102. (b) 4 Madd. 495. (c) 1 De G. & S. 333.

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would have been an intestacy as to the intermediate dividends. The explanation which he suggests of the substitution of the words "residue of my property," instead of "400*l.*," is, that the testatrix having ultimately determined to give her executor 20*l.* cash out of the 400*l.* stock, introduced the former words, because she could not tell how much stock would require to be sold to raise the 20*l.*, or how much would then be left. This explanation is certainly ingenious, but I am unable to adopt it, for the purpose of giving it any effect in the construction of this will.

The costs and expenses not included in the charge on the stock, and properly falling, in the first place, on the residuary estate, were admitted to be more than sufficient to exhaust the general residuary estate, and would, therefore, in part require to be raised out of the stock; and it was, therefore, unnecessary to decide, whether the effect of the charge of the debts and funeral expenses on the stock was, to exonerate the residue, or to do more than declare that the testatrix did not die intestate as to any part of her funded property, and that the whole residue of such property passed to the treasurer of the Church Missionary Society.

1853.

DIPPLE v. CORLES.

June 7th.

THE testator, having nine children, gave by his will the whole of his property to his eldest son. The eldest son, on the day of the funeral, communicated to the family his determination to divide the estate equally between himself and his brothers and sisters; adding, that he proposed to sell everything, in order that it might not be said that he had taken more than any of the others. He afterwards sold some personal chattels, and became himself the purchaser of the house in which the testator lived at a sum fixed or assented to by the rest of the family, —the husband of a married sister having signed a document expressing such assent on her behalf.

A testator, having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted, in respect of a portion of the property, according to the intention thus expressed; and with the assent of the other children, and at a valuation approved by them, he became the purchaser of a house and premises, part of the estate: —*Held*, with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and

Whilst a portion of estate was still undisposed of, a judgment creditor of *Thomas*, one of the sons, filed his bill against his debtor and *Edward* the eldest son, praying, that it might be declared, that the Plaintiff had a valid charge for the amount of his judgment debt and interest upon the share of the remaining hereditaments therein described, which the bill claimed as held by *Edward* upon trust for *Thomas*, and praying that *Edward* might be decreed to assign such share to the Plaintiff, and to account to the Plaintiff for the share of *Thomas* in the rents and profits of the premises previously to the assignment; and that, as against *Thomas*, the Plaintiff might have the benefit of the charge by foreclosure, sale, or otherwise.

Mr. *Southgate*, for the Plaintiff, argued that the language and acts of the Defendant *Edward*, with reference

divide it amongst the brothers and sisters, and that as such promise it was nudum pactum, and did not amount to a declaration of trust in their favour.

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to the devised estate, had had the effect of creating a trust for the benefit of the other children of the testator, and that to the benefit of such trust the incumbrancers of the children were entitled. He relied on that class of cases in which the owner of property, not contemplating any assignment of it to another, yet says in effect, that he will himself stand possessed of the property for the benefit of some objects of his bounty, and upon which declaration it had been held, that the owner had thus constituted himself trustee for the persons indicated: *Ex parte Pye*, *Ex parte Dubost* (a), *Kekewich v. Manning* (b), *Bentley v. Mackay* (c), *Whostley v. Purrr* (d), *Stapleton v. Stapleton* (e), *M'Padden v. Jenkyns* (f), *Thorpe v. Owen* (g).

Judgment.

VICE-CHANCELLOR:—

I do not think that any valid declaration of trust has been made of this estate for the benefit of the children, under one of whom the Plaintiff claims. I agree that it is not necessary that the precise words "trust" or "confidence" should be used, in order to create a trust, and that any expressions will suffice, from which it is clear that the party using them considers himself a trustee, and adopts that character. With regard to personal estate, it is not even necessary that the intention should be expressed in writing, but a trust may be created by parol. If, however, the case be one of doubt or difficulty upon the words which are supposed to have been used, the Court will give weight to the consideration, that the words, not being committed to writing in any definite and unquestionable form, may

(a) 15 Ves. 140.

(b) 1 De G., M. & G. 176.

(c) 15 Beav. 12.

(d) 1 Keen, 551.

(e) 14 Sim. 186.

(f) 1 Hare, 458.

(g) 5 Beav. 224.

not be the deliberately expressed sentiments of the party (a). Lord Eldon, in *Ex parte Pye* (b), adverts especially to the fact, that the testator had in that case "committed to writing" what he thought a sufficient declaration that he held that part of the estate in trust for the annuitant. The question now before me is, whether the conversation which took place on the day of the funeral of the father amounts to a declaration by the Defendant of an intention to constitute himself a trustee of this estate, or of any specific part of it, for his brothers and sisters. [The Vice-Chancellor then stated the expressions admitted to have been used, and the subsequent acts to the effect above mentioned.] No authority has been cited, nor do I think that any can be found, that, upon expressions not importing a determination to hold property upon trust for others, but importing nothing more than a determination to divide it amongst such other persons, it can be held, that such expressions constitute a trust, as distinguished from a mere promise to give. The question is, whether the Defendant *Edward Corles* did more than promise that he would divide the estate of his father amongst his brothers and sisters and himself, or whether he said that he would hold it, as to their aliquot shares, in trust for them. The subsequent acts and communications are not inconsistent with either view; but they are certainly more consistent with the supposition of the intention to give than of a trust. If he were a trustee, he would have been under an incapacity to purchase the house, and by the purchase he would on that supposition have placed himself in a situation in which his conduct would be liable to be impeached. It was remarked, that in the calculation of the sums to be divided, the Defendant *Edward Corles* had treated himself as an accounting party, by scrupulously stating and deducting the costs and expenses; but I do not see that this fact in any degree tends

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 v.
 CORLES.
 Judgment.

(a) Vide *Paterson v. Murphy*, supra, p. 91.

(b) 18 Ves. 150.

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 CORLEA.

Judgment.

to render the act less one of simple gift to his brothers and sisters. It is a fact which I do not think assists the argument on one side or the other.

It appears to me that a clear expression of intention should be found, before the Court, in a case like the present, can hold that a party intended to subject himself to all the consequences of the liability to account and inquiry which is involved in the position of a trustee. This Defendant, being honorably minded to do what was right between himself and his brothers and sisters, told them that he would make such a division of the property as they might conceive their father ought to have made; and if I were to hold that this declaration of his intentions subjected him to all the consequences of a declaration of trust of the property, the distinction between the position of a trustee and that of a person subject to the imperfect obligation created by what the law considers as only nudum pactum, would be obliterated.

A case was put in argument of a party, who, having a sum of £10,000 Consols, should say to another, "I have determined to make you a present of this fund," and who should afterwards recognise the gift by allowing the donee to receive the dividends on £5000, or a half of the stock, and it was asked, whether this, according to the decision in *Ex parte Pye* (a) and the other cases, would not create a trust for the party intended to be benefited. I think it very questionable whether the latter could successfully file a bill for the other £5000. I do not think that any case has gone the length of saying that a trust would thus be created as to the whole sum. In *Ex parte Pye*, the declaration extended to the whole fund which the cestui que trust claimed. In *Bentley v. Mackay* (b), the party in-

(a) 18 Ves. 140.

(b) 15 Beav. 12.

tended to be benefited by the voluntary settlement was permitted to receive the whole of the dividends on the stock; the acts of the parties were in entire accordance with the supposed trust. In *Wheatley v. Purr* (a), the transfer of the fund was made expressly in trust for the parties, and it was a case which admitted of no doubt. In *Stapleton v. Stapleton* (b), the transfer of the fund was made in the books of the bank, and five accountable receipts for £800 each were drawn and deposited in the names of the wife and four children for the benefit of the children. This was a declaration of trust of the debt, which thenceforth remained due from a third party. The trust fund was in fact mixed up with the other monies of the trustee, and the receipts were subsequently cancelled, and the proportions in which the fund was to be applied for the benefit of the different children were varied, but the daughter whose name was omitted in the subsequent appropriations of the fund took no more than her fourth share of the fund to which the declaration originally extended.

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The utmost that can be urged in behalf of the Plaintiff is, that the declaration of the Defendant in this case was equivocal; but that is not sufficient to establish the title which he claims. I think, however, that the evidence of what took place preponderates in favour of there being nothing more than a promise to give, and not any trust declared.

Mr. *Rolt*, for the Defendant, was not called upon.

(a) 1 Keen, 551.

(b) 14 Sim. 186.

1853.

June 23rd.

LANE v. DEBENHAM.

Where there was a devise and bequest of freehold and other property, and all other the testator's real and personal estate to two persons, their executors and administrators, upon trust by sale or otherwise, at their discretion, to raise and invest a certain sum of money, and apply the interest in the maintenance and education of the testator's daughter, until her age of twenty-one, and then to pay the same to her for her separate use; one of the devisees in trust after the death of the other, but during the lifetime of the daughter, and whilst, therefore, it was necessary that the charge should be raised, proceeded to sell the estate:—*Held*, on an objection to the title, that the surviving devisee in trust might exercise the option of selling, and the power of sale; and that an application in such a case for the direction of a Court of equity was unnecessary.

DANIEL FOSTER, by his will, dated in 1843, gave and devised unto *J. E. Lane* and *E. Powell*, their executors and administrators, his freehold house and premises, known as the *George Inn*, and the appurtenances, a piece of freehold meadow land called *Holywell*, two freehold cottages situated in *Spicer-street*, and a plot of ground at the corner of *Dagnal-lane*, all in *Saint Albans*; and also all or any sum or sums of money which might be due or coming to him on the security of any bill or bills, note or notes of hand or other memorandums, a schedule or list of which was therewith inclosed, all book or other contract debts, "and all other his (my) real and personal estate and effects whatsoever and wheresoever," and declared the trusts as follows:—"that the sum of 2000*l.* shall, as soon as convenient after my decease, be raised out of my said estates by sale or otherwise, at the discretion of my said trustees, and that the said sum of 2000*l.* shall be invested in some good and safe security in the names of my said trustees, and the interest and dividends arising therefrom shall be appropriated to the maintenance, support, and education of my daughter *Sarah Ann*, until she shall attain the age of twenty-one years, after which the said interest or dividends shall be duly paid to my said daughter half yearly for her separate use," for her life, or until the trusts thereof particularly created were otherwise determined. The testator then directed that the residue of his personal and real estate and effects should be invested or secured at the discretion of his trustees, and the rents, issues, and profits paid over to his wife for her life, subject to certain legacies to legatees therein named, to be paid at their respective ages

of twenty-one. And the testator directed that, at the decease of his wife, all such rents, issues, and profits should thenceforth be paid to his daughter, her executors, administrators, or assigns; and in case his daughter should die leaving lawful issue, then he directed that all the said real and personal estate and effects should become the absolute property of such issue; and in case his daughter should die before his wife, and leave no issue, he directed that all his said real and personal estate should be divided between certain nephews and nieces of himself and his wife therein named. By the usual trustee clauses, the testator declared, that his said trustee and trustees of that his will should be charged and chargeable only with such monies as they should actually receive by virtue of the trusts thereby reposed in them, &c.; and that it should be lawful for his said trustees respectively, by and out of the monies which should come to their or his hands, to retain or allow to each other all costs, &c.; but there was no clause declaring that the receipts of the trustees or trustee should be an indemnity to purchasers of the testator's estate for the monies therein expressed to be received. The testator thereby appointed his wife executrix, and *Lane* and *Powell* trustees and executors of his will; and he died in 1845. *Lane* and *Powell* and the widow proved the will, and the two former accepted and acted in the trusts of the devise. *Powell* died in 1851, the 2000*l.* not having been raised.

Lane, for the purpose of raising the 2000*l.*, caused certain of the devised premises to be offered for sale by public auction on the 19th May, 1852. The ninth condition of sale was as follows:—The whole of the property is sold by the vendor under the trusts of the will of Mr. *Daniel Foster*, deceased, the produce of which is to be invested upon the trusts of such will, and the purchaser shall be satisfied with the investment by the vendor, or, in case of his death, by his personal representatives, of the purchase-money for

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Statement.

each lot (after deducting the costs incident to the sale of the property) within twenty-one days after the receipt of such purchase-money, in the name of the vendor or his personal representatives, in such of the public funds as he or they may elect; and he or they will, if required by any purchaser, sign a declaration, that such investment is made on the trusts of the will of the said *Daniel Foster*, every such declaration to be prepared and executed at the expense of every purchaser requiring the same; and the respective purchasers are hereby excluded from making any objection to the title on account of the omission from the said will of a clause authorising his trustees or the vendor to give discharges for the purchase-money of the property to be sold under the trusts of the will.

The Defendant *G. Debenham* became, at the sale, the purchaser of Lot 1. He subsequently objected to the title, on the ground that the trust in the will for raising the sum of 2000*l.* could not be exercised by the Plaintiff as the surviving trustee. This question the parties agreed to submit to the Court in the form of a special case.

Argument.

Mr. *Chandless* and Mr. *Surrage* for the Plaintiff.

Mr. *Walker* for the Defendant.

The authorities cited were *Nicloson v. Wordsworth* (a), *Adams v. Taunton* (b), *Jones v. Price* (c), *Crewe v. Dicken* (d), *Forbes v. Peacock* (e), *Cooke v. Crawford* (f), *Ockleston v. Heap* (g), *Macdonald v. Walker* (h), and 1 Sugd. Powers, 143—146.

(a) 2 Swanst. 365.

(b) 5 Madd. 435.

(c) 11 Sim. 557.

(d) 4 Ves. 96.

(e) 1 Cr. & Ph. 717; *S. C.* 11

M. & W. 630.

(f) 13 Sim. 91.

(g) 1 De G. & S. 640.

(h) 14 Beav. 556.

VICE-CHANCELLOR:—

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 Judgment.

The devise in this case to *Lane* and *Powell*, their executors and administrators, of the specific freehold estate and other property, "and all other his real and personal estate and effects whatsoever and wheresoever," upon the trusts subsequently declared, is a devise which clearly passes the whole fee to the trustees, although the words executors and administrators are inapt words as to the realty. The question as to the mode of raising the 2000*l.* will not arise, unless the legatee for whose benefit it was intended is alive, a fact which is not stated in the special case. Looking at the question, which, it appears by a letter stated in the case, was asked by the purchaser, whether that person were alive,—to the fact that the abstract was then sent, and that the objection taken was that the discretion as to sale cannot be exercised by one trustee alone, and that the sum might be raised otherwise, I think I may assume the fact of the existence of the party interested at the time of the sale. It will be proper that the declaration of the Court should be prefaced by reciting that it proceeds upon that assumption.

The main question is, whether or not, there being a direct trust to raise 2000*l.* by sale or otherwise,—and thus a discretion to be exercised, and one of the trustees being dead,—it is thereby rendered impossible for the surviving trustee to execute this trust without the direction of the Court. The money, it is clear, must be raised; can the surviving trustee raise it by means of a sale, or is it necessary to come to the Court in order that the Court may exercise its discretion whether it is to be by sale, by mortgage, or by some other appropriation?

Mr. *Walker* has argued, that, whether the case be one of a power or a trust, if it be confided to two persons, or if it

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be a mere trust for sale, if it be said that the sale is to be made by two persons, a survivor of the two can never execute it. The argument proceeds, as it appears to me, upon an entire disregard of the distinction between powers and trusts. No doubt, where it is a naked power given to two persons, that will not survive to one of them, unless there be express words, or a necessary implication upon the whole will, shewing it to be the intention that it should do so. But the ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et forma*. It is therefore a rule of law, that, in all cases of powers, the previous estate is not to be defeated unless the power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust;—thus, if the direction be to raise a certain sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to *A.* and *B.* upon trust to sell, and thereby raise such a sum, it is I think a novel argument, that, after *A.*'s death, *B.* cannot sell the estate and execute the trust.

In *Nicolson v. Wordsworth* (a) and *Crewe v. Dicken* (b), and that class of cases, the question was a different one,—whether, under a devise to several persons, upon

(a) 2 Swanst. 365.

(b) 4 Ves. 97.

trust to sell,—where the sale takes place in the lifetime of one who has released or disclaimed the trust, the other trustees, in whom the estate is vested by such release, can execute the trust. In *Crewe v. Dicken*, there was a gift to *A.* and *B.*, in trust that they and the survivor of them should sell. One disclaimed, so that in fact the sale was not made by the survivor, and the question was whether the other trustee could sell. Mr. *Walker* said, that that class of cases turned on the construction given to the word survivor; but it was not only that—it was a question whether, in an event not contemplated by the testator; a person who was acting in the trusts, and in whom the devised estate was vested, could make a good title. In *Nicolson v. Wordsworth*, Lord *Eldon* said, he had not much doubt, and that in his own case, if he were himself the purchaser, he would not reject the title on that ground alone. Where there is a power given to *A.* and *B.*, and no estate given to them, if *A.* dies or renounces, *B.* alone cannot make a title. Lord *St. Leonards* thus states the rule:—"It is regularly true at common law, that a naked authority given to several cannot survive" (a); and he adds, "the same doctrine applies to powers operating under the Statute of Uses;" and he cites the case from *Dyer*, "where cestui que use in fee, before the Statute of Uses, willed that his feoffees *A.*, *B.*, and *C.* should suffer his wife to take the profits for her life, and that after her decease the premises should be sold by his said feoffees,—one of the feoffees died, and then the wife died:" and it was ruled that the survivors could not sell. But if an estate be given to two persons, upon trust to sell, there is no doubt the survivor may sell. The case is then within the rule put by Lord *Coke*, and which I am not aware has ever been disputed, that "as the estate, so the trust shall survive."

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The case of *Cooke v. Crawford* (b) and others, which

(a) 1 Sugd. Pow. 143.

(b) 13 Sim. 91.

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Judgment.

were relied upon, turned upon the question, whether the trustee could delegate his authority. The parties to whom the estate had been devised for sale had attempted to transfer or devise it to others; and it was held, that the parties thus irregularly constituted trustees of the estate could not exercise the powers, or sell or give discharges to the purchasers.

The case before the Master of the Rolls (*a*) was of the same description. The estate and powers were given to two trustees and the survivor of them; and the question was, whether the survivor could hand over to a devisee of the estate the performance of the powers also; and the Master of the Rolls held that to be so doubtful, that he could not force it upon an unwilling purchaser. Here the estate has not been transferred or devised to other persons, but remains in the survivor of the trustees, in whom the testator placed it.

The real difficulty, if it be one, is in the second point; upon which the argument for the Defendant proceeded,—the trust to raise “by sale or otherwise.” I do not think the words, “at their discretion,” are important. It is said, that the sum might be raised by mortgage or appropriation; and that this is a species of authority which the Court will not permit one person to exercise, where it was given originally to two. If, it was asked, the authority follows the estate,—when, on the decease of the trustee, the real and personal estate is separated,—with which estate does it go? Is the heir or the executor to have it? I do not say that a difficulty might not arise upon this point, but it has not arisen. There might be some question whether the authority had come to an end if the real and personal estate had fallen into different hands; but one trustee

(*a*) *M'Donald v. Walker*, 14 Beav. 556.

still alive; and I apprehend, that where you have an absolute trust to raise out of a common fund a sum of money, either by sale or otherwise, in clear terms, as in this case, there is no such difficulty as has been suggested. The sum being necessary to be raised, it is clear, that, if the case were brought here, the Court would direct the surviving trustee to raise the money, he having the whole legal estate, and being subject to the obligation to execute the trust. He has the same power as was given to the two trustees,—a power arising from the combined circumstances of the absolute duty which is imposed upon him, accompanied by an estate which enables him to perform it.

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The trustee has, in this case, executed the duty which the trust has cast upon him; and I am asked by the Defendant to say, that, in doing so, he has committed a breach of trust, because he has proceeded to raise the money after the death of his co-trustee. If I were to lay down such a rule, where is it to stop? It would follow, that, whenever an estate is vested in two or more trustees to raise a sum by sale or mortgage, or even to sell by auction or private contract, the parties must, after the death of one of the trustees, come to this Court for directions before they can execute the trust. The Court has not better means of exercising the option than the party against whom the objection is taken, nor are its means so good. I think, as I have observed, that the fallacy of the argument on behalf of the Defendant is in mixing together the rules applicable to bare powers or authorities, and those applying to interests.

Minute.

RECITE, that, it appearing by the letter of the 20th of May, that inquiry was made by the Defendant's solicitors, whether Sarah Anne, the daughter of the testator, were living, and whether she had any issue, and the abstract of title having been afterwards sub-

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mitted, and the Defendant's solicitors having then by their letter of the 7th of June required to be satisfied that the 2000*l.* had not been raised by any prior sale or investment, and having raised no question other than the question, whether that sum could be raised by *Lane* as the surviving trustee, the Court is of opinion that the trust contained in the will for raising the sum of 2000*l.* can be exercised by the Plaintiff as the surviving trustee.

June 3rd
 and 24th;
 July 13th.

A bequest of residuary personal estate to *A.* for life, and should she have a child or children, then to it or them for ever. After the death of the testatrix, *A.* married, and had issue:—*Held*, that, pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law, —the children of *A.*, notwithstanding their interests vested necessarily at different times as they came into *esse*, took as joint tenants.

KENWORTHY v. WARD.

THE will of *Elizabeth Wordsworth*, made in October, 1838, after several specific and pecuniary bequests, contained the following residuary gift:—"I give her [*Harriet Elizabeth Leatham*, a legatee named in a clause immediately preceding,] the interest of the residue of my property for her life, and should she marry and have a child or children, I give it or them the principal for ever; should she not marry and have a child or children, I then at her death leave the principal to be equally divided between the oldest living descendant, male or female, of my cousin *William Leatham*, and the oldest living descendant, male or female, of my cousin *Luke Howard*, and the oldest living descendant, male or female, of my cousin *Elizabeth Howard*." The residuary personal estate was ascertained, and invested in the funds in the names of the executors.

After the death of the testatrix, *Harriet Elizabeth Leatham* intermarried with the Plaintiff, *Joseph Kenworthy*, and died in 1853, leaving three children living, and having had a fourth child, who died in infancy; the Plaintiff subsequently, as the administrator of his deceased child, filed his claim against the executors of the testatrix

for a transfer to himself of one-fourth of the residuary personal estate.

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Argument.

Mr. *Rolt* and Mr. *Eddis*, for the Plaintiff, argued, that the gift to the children of the tenant for life created a tenancy in common. In *Woodgate v. Unwin* (a), a case like the present, it was held that the gift to children was wanting in the unity of the time of vesting, which is necessary to the creation of a joint tenancy; for the children come into esse, and their interests consequently vest, at different times. "If lands be demised for life, the remainder to the right heirs of *J. S.* and of *J. N.*; *J. S.* hath issue and dieth, and after *J. N.* hath issue and dieth; the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time:" Co. Litt. 188. a. It is only different in the case of conveyances by way of use; for, "if *A.* make a feoffment in fee to the use of himself and of his wife that shall be, for the term of their lives, upon the marriage the wife shall take jointly with him, notwithstanding they come to their estates at several times: "Sanders' Uses, 135; Co. Litt. 188. a.; but the reason of the difference is, that, in the case of the use, the estate is vested and settled in the feoffees till the future use comes into esse: Co. Litt. 188. a., n. (13). This, being a bequest of personalty, is in the nature of a common law conveyance, and must be governed by the same rule as a feoffment. The law relating to bequests of personal estate is derived from the civil law rather than from any analogy to the effect of the Statute of Uses; and the rule of the civil law, as well as that of equity, inclines in favour of tenancy in common as the more equal and beneficial tenure.

Mr. *Willcock* and Mr. *Goren*, for the three surviving children of the Plaintiff, argued, that the children took

(a) 4 Sim. 129.

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under the will as joint tenants, and that the share of the deceased child, therefore, survived to the other three: *Stratton v. Best* (a), *Oates d. Hatterley v. Jackson* (b), *Fearne Conting. Rem. c. 4, s. 4*, (p. 312, edit. 9). The bare principle laid down in *Coke Littleton*, without the qualification, was alone cited in *Woodgate v. Unwin*, and that case had never been followed: *Currie v. Gould* (c), *Dick v. Lacy* (d), *Amies v. Skillern* (e). It was material to note, that, where the testatrix had wished to create a tenancy in common, as in the gift over, she had used proper words to effect the intention. In bequeathing the principal to "it or them," the testatrix spoke of a child or children distinctly as constituting a class.

Mr. *Lee* (am. cur.) mentioned the case of *Mence v. Bagster* (f), and cases there referred to.

Judgment.

VICE-CHANCELLOR :—

The question is, whether the legatees take this sum of money as joint tenants or as tenants in common. I find it impossible to reconcile the case of *Woodgate v. Unwin* (g) with that of *Amies v. Skillern* (h), if the principle of *Woodgate v. Unwin* must be taken as laying down, that, where there is a gift to children on attaining the age of twenty-one years, the mere circumstance of these children coming into esse at different periods is of itself sufficient to convert the joint tenancy into a tenancy in common. That case may, perhaps, be supported on this position, that one child

(a) 2 Bro. C. C. 233.

(b) 2 Str. 1172.

(c) 4 Beav. 117.

(d) 8 Beav. 214.

(e) 14 Sim. 428.

(f) Since reported 4 De G. & S. 162.

(g) 4 Sim. 129.

(h) 14 Sim. 428.

having attained twenty-one years of age, and having thus acquired a vested interest, cannot be a joint tenant with children who have no vested interest, because they cannot be joint tenants with him. Not even on that ground, however, can I reconcile *Woodgate v. Unwin* with *Amies v. Skillern*, or, as it appears to me, with the general current of authorities. In *Amies v. Skillern*, the gift was to and amongst all the children of the testator's brother *Isaac*, for their respective lives; and as they should respectively die, the principal of their respective shares was to go to their respective children. One of the daughters of *Isaac* married *George Boyce* and had three children, two of whom were dead when the surviving child claimed by survivorship. The Court declared, that, according to the true construction of the will, the children of *Ann Boyce* took as joint tenants, and that the Plaintiff, as the surviving joint tenant, took the whole. I am not able to distinguish that case upon any intelligible principle from the one now before me. *Woodgate v. Unwin* was cited in the argument; but the Vice-Chancellor of *England* said there was nothing in the will to shew that the children of any one child of *Isaac* were to take the share of which the parent was tenant for life otherwise than as joint tenants. I must say, I do not think the two cases are in principle distinguishable. In following the case of *Amies v. Skillern*, in which it appears to me the whole law on the subject is stated in the clearest manner, I am in truth supported by the authority of the late Vice-Chancellor of *England* in the latest of the two decisions.

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In *Samme's case* (a), which is the foundation of the observation in *Gilbert on Uses* (b), there was a grant of lands to the father, habendum to the father and son, their heirs and assigns, to the use of the father and son, their heirs and assigns; and the Court held, that the use limited to the use of the father and son was good, although the son could not

(a) 13 Rep. 54.

(b) P: 70.

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take by the habendum, forasmuch as he was not named in the premises; but the question of greater doubt was, whether the father and son were joint tenants or tenants in common, a question which arose on the right of wardship of the son, who had survived the father. "It was objected, when the father only is enfeoffed, to the use of him and his son and their heirs in the *Per*, that in this case they shall be tenants in common. By the feoffment the father is in by the common law in the *Per*, and then the limitation of the use to him and his son and to their heirs cannot divest the estate, which was vested in him by the common law, out of him, and vest the estate in him in the *Post*, by force of the statute, according to the limitation of the use. And therefore, as to one moiety, the father shall be in by force of the feoffment in the *Per*, and the son as to the other moiety shall be in by force of the statute, according to the limitation of the use in the *Post*, and by consequence they shall be tenants in common. But it was answered and resolved, that they were joint tenants," "for if at the common law *A.* had been enfeoffed to the use of him and *B.* and their heirs, although that he was only seised of the land, the use was jointly to *A.* and *B.*; for a use shall not be suspended or extinct by a sole seisin or joint seisin of the land"(*a*). Several cases are then put in illustration of the argument; and finally "It was resolved, that joint tenants might be seised to an use, although they come to it at several times: as if a man maketh a feoffment in fee to the use of himself and to such a woman which he shall after marry, for term of their lives, or in tail, or in fee; in this case, if after he marrieth a wife, she shall take jointly with him although that they take the use at several times, for they derive the use out of the same fountain and freehold, i. e., the feoffment. So if a disseisin be had to the use of two, and one of them agreeth at one time, and another at another time, they shall be joint tenants; but otherwise it is of estates which pass by the

(*a*) 13 Rep. 55.

common law ; and therefore, if a grant be made by deed to one man for term of life, the remainder to the right heirs of *A.* and *B.* in fee, and *A.* hath issue and dieth, and afterwards *B.* hath issue and dieth, and then the tenant for life dieth, in that case the heirs of *A.* and *B.* are not joint tenants ;"—“because, that although the remainder be limited by one fine, and by joint words, yet because that by the death of *A.* the remainder as to the moiety vested in his heir, and by the death of *B.* the other moiety vested in his heir at several times, they cannot be joint tenants. But in the case of a use, the husband taketh all the use in the meantime ; and when he marrieth, the wife takes it by force of the feoffment and the limitation of the use jointly with him, for there is not any fraction and several vesting by parcels, as in the other case, and such is the difference”(a). The last observation would apply in some degree to the possible view which I have suggested may be taken of *Woodgate v. Unwin*, the children as they come into esse taking a contingent though transmissible right, as these rights are now allowed to be.

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The doctrine is clearly stated, and put upon the ground of intention in the learned argument in *Shelley's case* (b). In that argument the same instance is given of a feoffment in fee by a man to the use of himself and any wife he might marry ; and the argument proceeds to say, “and so it is said in the book in the case of a devise, as if a man devises lands for life, the remainder in fee, and the tenant for life refuses, yet the remainder is good. “And so note that the limitation in uses and estates given by devises resemble one another. So the judges there took the construction of devises and of estates conveyed in use to be all one, viz. according to the meaning of the parties”(c). At common law, when the interest has once vested in remainder, it must vest either wholly in one or be taken in

(a) 13 Rep. 56, 57.

(b) 1 Rep. 89.

(c) Id. 101.

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moieties : they must take the entirety one way or the other ; and there is no mode, as there is in a use, of getting the entirety into one, and then taking it out of him afterwards by the springing use, as soon as the cestui que use comes into esse. Therefore at common law there is no remedy ; you must once for all see what estate *A.*, the party in remainder, is to take : that estate he takes and will hold for the rest of his existence, there being no uses declared by means of which any portion may be taken out of him ; and therefore you have once for all to ascertain whether he will take the whole or a moiety,—the intent being that he should take the moiety, and not the whole. If he took the whole it would be against the intent.

The question has been much discussed. Lord *Coke* and the lawyers of that day rather seem to have preferred the metaphysical notion, that the old use remained in the husband ; and that, where there was a conveyance by the husband creating the new use, that the old use resulted and came into existence at the time that the new use arose. Sir *Edward Sugden* says, it is at this day clear, that persons may take as joint tenants by way of use although at different times (*a*). In *The Earl of Sussex v. Temple* (*b*), *Holt*, C. J., says, “ The estate is limited by way of use to the issues females, and issues females comprehend all issues females. Then the case is, tenant for life, remainder to all his issues females, &c., if the tenant for life has but one daughter she shall have the whole estate tail ; if he has more daughters, they shall be joint tenants for life with several inheritances. If the contingent remainder vests during the particular estate or *eo instante* that it determines, it is enough. The case in Co. Litt. 188. a., of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint tenants, which case will rule the case in question : for it is a joint claim by

(*a*) Gilbert on Uses, p. 71, n. (10), 3rd edit., 1811.

(*b*) 1 *Ld. Raym.* 310.

the same conveyance which makes joint tenants, and not the time of the vesting." "And," the reporter adds, "he seemed to deny the case cited out of Co. Litt. 188." But I should think it is much more probable that Lord *Holt* took the distinction between a common law conveyance and a conveyance to uses, which has always been considered as well founded in law. In the case of *Stratton v. Best* (a), which was a conveyance to uses, Lord *Thurlow* says distinctly, that "the vesting at different times would not prevent its being a joint tenancy" (b). I come lastly to consider the case of *Oates d. Hatterley v. Jackson* (c). That was a devise to the testator's widow for life, and after her death to the testator's daughter *Isabella* and her children, of her body begotten or to be begotten by *William* her husband, and their heirs for ever. It was held that the daughter and her children took as joint tenants, she having one child at the time of the devise and other children subsequently born—all of whom died in the lifetime of the mother, who by survivorship therefore took the whole. That case is cited and approved by the Vice-Chancellor of *England* himself in *Bridge v. Yates* (d). Mr. *Fearne* apparently takes the same view; for, referring to the doctrine of Lord *Coke* in the case put of the heirs of two persons taking as tenants in common, he says, "that doctrine seems to be confined to limitations at common law, and not to extend to estates raised by way of use or by devise" (e). It was indeed admitted, in the argument of this case, that it comes to this point,—whether, in deciding the question, I am to follow the law as to uses and devises, or to follow the course of decisions on conveyances at common law. I think there can be no question, that, with reference to trusts, I ought to follow what is said to be the

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(a) 2 Bro. C. C. 233.

(b) Id. 240.

(c) 2 Str. 1172.

(d) 12 Sim. 645.

(e) *Fearne*, Cont. Rem. 312,
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moieties : they must take the entirety one way or the other ; and there is no mode, as there is in a use, of getting the entirety into one, and then taking it out of him afterwards by the springing use, as soon as the cestui que use comes into esse. Therefore at common law there is no remedy ; you must once for all see what estate *A.*, the party in remainder, is to take : that estate he takes and will hold for the rest of his existence, there being no uses declared by means of which any portion may be taken out of him ; and therefore you have once for all to ascertain whether he will take the whole or a moiety,—the intent being that he should take the moiety, and not the whole. If he took the whole it would be against the intent.

The question has been much discussed. Lord *Coke* and the lawyers of that day rather seem to have preferred the metaphysical notion, that the old use remained in the husband ; and that, where there was a conveyance by the husband creating the new use, that the old use resulted and came into existence at the time that the new use arose. Sir *Edward Sugden* says, it is at this day clear, that persons may take as joint tenants by way of use although at different times (*a*). In *The Earl of Sussex v. Temple* (*b*), *Holt*, C. J., says, “ The estate is limited by way of use to the issues females, and issues females comprehend all issues females. Then the case is, tenant for life, remainder to all his issues females, &c., if the tenant for life has but one daughter she shall have the whole estate tail ; if he has more daughters, they shall be joint tenants for life with several inheritances. If the contingent remainder vests during the particular estate or *eo instante* that it determines, it is enough. The case in Co. Litt. 188. a., of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint tenants, which case will rule the case in question : for it is a joint claim by

(*a*) Gilbert on Uses, p. 71, n. (10), 3rd edit., 1811.

(*b*) 1 *Ld. Raym.* 310.

the same conveyance which makes joint tenants, and not the time of the vesting." "And," the reporter adds, "he seemed to deny the case cited out of Co. Litt. 188." But I should think it is much more probable that Lord *Holt* took the distinction between a common law conveyance and a conveyance to uses, which has always been considered as well founded in law. In the case of *Stratton v. Best* (a), which was a conveyance to uses, Lord *Thurlow* says distinctly, that "the vesting at different times would not prevent its being a joint tenancy" (b). I come lastly to consider the case of *Oates d. Hatterley v. Jackson* (c). That was a devise to the testator's widow for life, and after her death to the testator's daughter *Isabella* and her children, of her body begotten or to be begotten by *William* her husband, and their heirs for ever. It was held that the daughter and her children took as joint tenants, she having one child at the time of the devise and other children subsequently born—all of whom died in the lifetime of the mother, who by survivorship therefore took the whole. That case is cited and approved by the Vice-Chancellor of *England* himself in *Bridge v. Yates* (d). Mr. *Fearne* apparently takes the same view; for, referring to the doctrine of Lord *Coke* in the case put of the heirs of two persons taking as tenants in common, he says, "that doctrine seems to be confined to limitations at common law, and not to extend to estates raised by way of use or by devise" (e). It was indeed admitted, in the argument of this case, that it comes to this point,—whether, in deciding the question, I am to follow the law as to uses and devises, or to follow the course of decisions on conveyances at common law. I think there can be no question, that, with reference to trusts, I ought to follow what is said to be the

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(b) Id. 240.

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(d) 12 Sim. 645.

(e) *Fearne*, Cont. Rem. 312,
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moieties : they must take the entirety one way or the other ; and there is no mode, as there is in a use, of getting the entirety into one, and then taking it out of him afterwards by the springing use, as soon as the cestui que use comes into esse. Therefore at common law there is no remedy ; you must once for all see what estate *A.*, the party in remainder, is to take : that estate he takes and will hold for the rest of his existence, there being no uses declared by means of which any portion may be taken out of him ; and therefore you have once for all to ascertain whether he will take the whole or a moiety,—the intent being that he should take the moiety, and not the whole. If he took the whole it would be against the intent.

The question has been much discussed. Lord *Coke* and the lawyers of that day rather seem to have preferred the metaphysical notion, that the old use remained in the husband ; and that, where there was a conveyance by the husband creating the new use, that the old use resulted and came into existence at the time that the new use arose. Sir *Edward Sugden* says, it is at this day clear, that persons may take as joint tenants by way of use although at different times (*a*). In *The Earl of Sussex v. Temple* (*b*), *Holt*, C. J., says, “ The estate is limited by way of use to the issues females, and issues females comprehend all issues females. Then the case is, tenant for life, remainder to all his issues females, &c., if the tenant for life has but one daughter she shall have the whole estate tail ; if he has more daughters, they shall be joint tenants for life with several inheritances. If the contingent remainder vests during the particular estate or *eo instante* that it determines, it is enough. The case in Co. Litt. 188. a., of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint tenants, which case will rule the case in question : for it is a joint claim by

(*a*) Gilbert on Uses, p. 71, n. (10), 3rd edit., 1811.

(*b*) 1 *Ld. Raym.* 310.

often as they should think necessary, at any meeting or meetings to be holden for that purpose, to order and direct a rate or rates, assessment or assessments, to be made, charged, or levied upon the tenants or occupiers, not exceeding two shillings in the pound in any one year on the full annual value of all houses and other buildings and erections in the town and borough of Plymouth (within certain limits therein mentioned); and that such rate or rates, assessment or assessments should be made at any time after the passing of the Act, and should be assessed and raised by such payments as the commissioners should think fit and direct, and should when collected be paid to the treasurer for the time being of the said commissioners. And the Act (s. 128) directed that all the monies which should be raised by virtue of the Act from and by the rates and assessments thereinbefore authorised to be assessed and levied, and all the monies which should be borrowed on mortgage of the same rates and assessments, and all the monies which are therein directed to be applied to the purposes of the Act in regard to the disposal of which no specific directions are therein given, should be and the same were thereby vested in the commissioners; and that the same should be paid, applied, and disposed of by and under the order of the commissioners in manner following (viz.) in paying and defraying the expenses of applying for or incident to the obtaining and passing of that Act, and in paying off and discharging all monies, debts, and demands theretofore borrowed or otherwise incurred and remaining due and owing by virtue of the Acts thereinbefore recited, and in or for the paying and defraying the charges and expenses of providing materials for, and paving, stoning, flagging, repairing, amending, widening, fencing, and improving the streets, public quays, lanes, roads, passages, market-place and other public places within the said town and borough; and of the present and future tunnels, gutters, sinks, drains, sewers, and water-courses in or belonging thereto; and also in providing a

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sufficient number of lamp-posts, lamp-irons, and keeping the same in repair from time to time, and in paying and defraying the charges and expenses of lighting, watching, and regulating the same streets, public quays, lanes, roads, passages, market-place and other public places, in the manner thereby directed, and for paying the purchase moneys for, and the costs, charges, and expenses of and attending or incident to the purchase of any messuages, houses, buildings, walls, lands, tenements, or hereditaments, or any part or parts thereof, which by that Act are authorised to be purchased; and all other costs, charges, and expenses relating or incident to the execution of that Act; and the powers and authorities thereby given to the said commissioners, and in and for paying the annual interest of the principal moneys to be borrowed on the credit of such rates and assessments by virtue of that Act, and in and for paying off the principal moneys to be borrowed as last aforesaid; and in and for carrying the intents and purposes of that Act into full and complete execution in other respects, or in and for any of the aforesaid purposes, and for no other use, intent, or purpose whatsoever.

Under this Act the commissioners proceeded to execute their powers; and they for several years carried on the purposes of the Act, and from time to time levied rates for such purposes. The powers of the commissioners were in some degree abridged by the Municipal Corporations Act, (5 & 6 Will. 4, c. 76, s. 84 (a),) which reduced the rate to

(a) Sect. 84 enacts, "That, as soon as constables shall have been appointed by the watch committee for any borough, a notice, signed by the mayor of such borough, specifying the day on which such constables shall begin to act, shall be fixed on the door of the Town-hall and every church within such borough; and on the day so specified in such notice, so much of all Acts named in conjunction with such borough in the schedule (E.) to this Act annexed, and of all Acts made before the passing of this Act, as relates to the appointment, regulation, powers, and duties, or to

be levied by them to an amount the *maximum* of which was not to exceed the average of the preceding seven years expenditure for purposes other than watching.

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At a meeting of the commissioners on the 27th of December, 1852, a resolution was come to and passed by a majority of the commissioners present thereat, which was as follows:—"Resolved, that the usual and necessary petition to Parliament for the proposed Plymouth Improvement Bill, in pursuance of the Standing Orders of Parliament, be now signed." And at the same meeting the majority of the commissioners passed a further resolution, that their solicitors and surveyor should be authorised to take all necessary proceedings in order to procure the passing of the said bill through Parliament.

The information stated, that, in pursuance of the said resolutions, a bill had been introduced by or on behalf of the commissioners in the Commons House of Parliament in the then present session, intituled "A Bill for the Improvement

the assessment or collection of any rate to provide for the expenses of any watchmen, constables, patrol, or police for any place situated within such borough, shall cease and determine;" and all watch-houses, &c., shall be given up, &c. "Provided, nevertheless, that, in every case in which, before the passing of this Act, a rate might be levied in any borough for the purpose of watching conjointly with any other purpose, nothing in this Act contained shall be construed to prevent the levying and collecting of such rate for such other purpose solely, or to repeal the powers given in any Act, so far as the same relate to such other purpose: Provided always, that

where the amount of such rate, before the passing of this Act, might not exceed a given rate in the pound on the value of property rateable thereunto, the rate so to be levied for such other purpose solely shall not exceed such proportion of the said given rate in the pound as shall appear to have been expended for such purpose other than watching, by an account of the average yearly expenditure during the last seven years; or, where such rate shall not have been levied during seven years, then during such less number of years as such rate shall have been levied."

The Act 5 Geo. 4, c. xxii. is inserted in Schedule E.

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of the Borough of Plymouth and for other purposes;" and the short title of which was, "The Plymouth Improvement Act, 1853;" and such bill was then pending and in course of prosecution through Parliament by the Defendant *William Eastlake* and his co-partners, the solicitors of the commissioners, and their agents, (the said *William Eastlake* being also their clerk, in whose name they were to be sued according to the said Act); and the information stated, that one of the provisions of the said bill was, that, on and from the commencement of the said intended Act, the said Improvement Act (5 Geo. 4, c. xxii.) should be repealed.

The information stated, that, in consequence of such resolutions, divers preliminary and other expenses to a considerable amount had already been incurred in the prosecution of the said bill in Parliament, all of which expenses the said commissioners threatened and intended to charge and pay upon and out of the rate and funds levied and raised, and to be levied and raised, under the said Act, 5 Geo. 4, c. xxii.; and in particular that their treasurer had, by their direction, out of the moneys arising from the said rates, paid considerable sums, among others as therein mentioned, towards such preliminary expenses.

The information alleged that all such payments were contrary to the provisions of the said Act, and were illegal and improper, and a misappropriation of the funds and rates levied under the said Act; and it prayed that the commissioners, their treasurer, clerks, solicitors, and agents might be restrained by injunction from paying or expending any monies, being part of or arising from or out of the rates levied or to be levied under the said Act, for, towards, or in respect of any costs, charges, and expenses whatsoever incurred or to be incurred in or about the preparing, promoting, or prosecuting of the said bill in Parliament; and

that the Defendants, the commissioners, as such commissioners, might be restrained by injunction from further prosecuting or promoting the said bill. The information also prayed an account of the moneys so alleged to be improperly applied; and that the Defendants, or such of them as were present when such orders of payment were made, should repay the sums so applied.

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On the part of the Defendants, for the purpose of shewing the propriety and necessity of the proceedings they had adopted to procure a new Act, it was shewn, that, although they were authorised by the Act 54 Geo. 4, c. xxii. to levy two shillings in the pound in the year on the rental of property situated within the limits therein mentioned, they had not, until the year 1835, when the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) passed, levied more than one shilling and sixpence in the pound in the year; and by the Municipal Corporation Act (s. 84), the watching of the town being transferred from the commissioners to the town council, and the future rating of the town under the Act 5 Geo. 4, c. xxii., being limited to the average of the preceding seven years, such rating was in effect reduced to a maximum of one shilling and threepence in the pound.

It was further shewn, on the part of the Defendants, that the population of Plymouth, which by the census of 1821,—three years before the passing of the Act 5 Geo. 4, c. xxii.,—was 21,591, had, at the census of 1851, increased to 52,223; that the necessity of providing for the paving, lighting, and improving the numerous localities, which had become densely populated since the passing of the Act, and the exigencies of the older parts of the town, had pressed very heavily on their available funds; and that since the passing of the Municipal Corporation Act their restricted powers did not enable them to raise sufficient funds for the objects which they had to accomplish. The affidavits on behalf of

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the Defendants also stated that the drainage of the town was so defective that the health of the inhabitants was seriously prejudiced; that an excess in the mortality of Plymouth had at length caused the Board of Health to institute an inquiry into the sanitary condition of the town; and that the Act of the 5 Geo. 4, c. xxii., containing no compulsory powers for drainage or sewerage,—several committees had been appointed by the inhabitants, the town council, and the commissioners under the Act,—which committees had jointly recommended that application should be made to Parliament to extend and amend the Act of the 5 Geo. 4, c. xxii.

In explanation of the opposition with which the proposed measure had subsequently met, the affidavits stated that the town council of Plymouth was at the same time prosecuting in Parliament a “Water Works” Bill; that the rates thereby proposed to be levied were originally high, and were afterwards modified, but the bill had caused considerable excitement and opposition; and the two bills, though contemplating totally different objects, and being applied for by entirely distinct bodies, were confounded together and treated as identical by many of the ratepayers, numbers of whom had petitioned against the improvement bill, under an impression that they were petitioning against the water-works bill.

The relators moved for the injunction.

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Mr. Follett and Mr. J. H. Palmer, for the motion, relied on the *Attorney-General v. Andrews* (a); and contended, that, wherever the purposes of the fund, however created, are public or charitable, the Attorney-General may interpose by information to rectify its improper application:

(a) 2 M.N. & G. 225.

Attorney-General v. Compton (a). In *The Attorney-General v. The Guardians of the Poor of Southampton* (b), the Defendants had failed in passing through the House of Commons a bill which they had sought for rating the owners of small tenements, and were restrained from paying out of the poors-rate the expenses they had incurred; and in *The Attorney-General v. The Corporation of Norwich* (c), the Court adverted to the point that the corporation, being trustees, ought not to have made an application to Parliament, of doubtful result, without the leave of the Court. In the present case the purposes of the fund were clearly of a public and charitable nature: *The Attorney-General v. Brown* (d), *The Attorney-General v. Heelis* (e), *The Attorney-General v. The Mayor, &c., of Dublin* (f).

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Mr. Rolt and Mr. Kinglake, for the Defendants the commissioners, contended, first, that the funds in question were not derived from any source which conferred upon them the character of charity, or affected the Defendants with any charitable trust: *Attorney-General v. Heelis* (e). The Attorney-General was not therefore entitled to sue on the public behalf,—nor had the Court jurisdiction to interfere. Secondly, the application of the funds for the purpose of obtaining a new Act to extend the powers of the former Act was perfectly justifiable. It would be unreasonable to say, that, the commissioners, having certain duties to perform, knowing what those duties were, and finding an obstacle in the way of their performance, were, not merely at liberty, but bound, to take every legitimate step to remove the obstacle out of their way: *The King v. The Commissioners of Sewers in the Tower Hamlets* (g). The pro-

(a) 1 Y. & C. C. C. 417.

(b) 17 Sim. 6.

(c) 16 Id. 225.

(d) 1 Swanst. 265.

(e) 2 S. & S. 77.

(f) 1 Bligh, N. S. 312.

(g) 1 B. & Ad. 232, 239.

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posed measure, moreover, was only defensive, for it was to recover that which the Municipal Corporation Act had in effect taken away. It was no more than opposing the consequences of that Act; and, to oppose a measure affecting the rights with which they were invested, had by decision been held to be within the compass of their authority: *Bright v. North* (a). The case of *Parker v. The Dun Navigation Company* (b) was also cited, on the point that the case was not one in which the Court would interfere. Lastly, it was contended, that the application for the injunction was made after expenses had been incurred in proceedings, of which sufficient notice had been given, and that the Court would not therefore interfere upon an interlocutory application.

Mr. W. M. James and Mr. Hodgson for the Defendant *Eastlake*.

Judgment. VICE-CHANCELLOR:—

This case seems to me to be so entirely concluded by authority, that it is impossible for me to say that the Attorney-General is not entitled to the injunction which is asked.

Three points have been raised:—The first, which is in itself of considerable importance, is, whether it is competent to the Attorney-General, in a suit of this description, and a special matter of this kind, to apply, on behalf of the public, to restrain the application of funds in the hands of commissioners, raised simply by a tax on a portion of the community, namely, the population of *Plymouth*, to purposes which, upon this view

(a) 2 Phil. 216.

(b) 2 De G. & S. 192.

of the case, I must assume to be contrary to the purposes of the Act. That is the first point raised. Secondly,—assuming I should be against the Defendants on that view, and that the Attorney-General is entitled to maintain the suit, supposing the funds to be improperly applied,—then they say, that the funds are not improperly applied, regard being had to the special provisions of the 128th section of their Act, which I shall refer to presently. And thirdly, it is urged, that the application has been made at such a late stage, that it is not right for the Court to interfere summarily by injunction; but that the whole matter ought to wait until it is disposed of at the hearing, because they say no allegation is made that there will be any danger or loss to the fund, in case it should be found by the Court to have been misapplied.

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Now, with regard to the first point, the whole of the argument, in fact, rests on Sir *John Leach's* language in *Attorney-General v. Heelis* (a). Sir *John Leach* had argued the case of *The Attorney-General v. Brown* (b), no doubt most ably, in support of the demurrer to the information and bill in that case; and the point he urged there was, that the Attorney-General was not the proper person to represent the fund in question in that suit; that it was not a fund given for a charitable purpose, or if it was a fund for a charitable purpose, or for a public purpose which might be considered charitable, if a gift had been made for that particular purpose, yet that it was not to be considered charitable, when it had been raised, in fact, by taxation on various inhabitants of the town. There happened to be in that case two things,—an imposition by the legislature of a general tax on coals, for the purpose of improving the defences, against the sea and against enemies, of the town of Brighton; and there was also a power to the commissioners to raise money by taxation of the inhabitants

(a) 2 S. & S. 77.

(b) 1 Swanst. 265.

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of *Brighton*; and no doubt the observations of Lord *Eldon* in that case in some degree turned upon the fact of there having been what he called a concession by Parliament of the tax on coals, for the purpose of parties who were not able to protect and defend themselves. Those observations fell from Lord *Eldon* in *The Attorney-General v. Brown*(a), and seem to have been the foundation for the distinction drawn by Sir *John Leach* in *The Attorney-General v. Heelis*: but Lord *Eldon* went on further to say, that, in that case, he had not the slightest doubt that objects of that description, protecting the town from the sea, and improving its groynes and other objects of that kind, for the general benefit of the town, were in themselves not only public trusts, but what might be called charitable trusts, within the statute of Elizabeth. Neither is it here contended by anybody, that a gift for the purpose of lighting or paving *Plymouth*, or still more for the benefit of objects which are recited in the preamble of the Act:—"for the benefit of the *Gun Wharf*, the *Royal Naval Hospital*, the *Royal Marine Barracks*, and other public establishments," would not be a gift for charitable purposes within the statute. The distinction which Mr. *Rolt* drew was that taken in *The Attorney-General v. Heelis*, in which Sir *John Leach*, after observing, that not only the particular, public, or general purposes expressed in the statute of Elizabeth are charitable, but that all other legal, public, or general purposes are within the equity of the statute, proceeds to say, that "it is the source from whence the funds are derived, and not the mere purposes to which they are dedicated, which constitute the use charitable" (b). That is the distinction which is taken. If you find a gift from an individual, or the Crown or the Legislature, of a sum of money for a purpose which is a charitable purpose, that is a charitable trust to all intents and purposes; but if you raise money for a purpose

(a) 1 Swanst. 301, 302.

(b) 2 S. & S. 77

which in itself might be a charitable purpose, by taxation from the very persons (for that was the object and gist of his observation,) that would be benefited by that which would be a charity if it was a gift from another—if you raise it by taxation from those parties, then you are only taxing those parties to do good to themselves. It amounts to that, although Sir *John Leach* does not say so in words,—it is in fact,—that the parties are subscribing in a particular manner and form for their own individual benefit.

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After the decision in the *Attorney-General v. Heelis*, the question came before the House of Lords in the case of *The Attorney-General v. The Mayor &c. of Dublin* (a), a case as analogous to that which is now before me as can be conceived. The corporation of *Dublin* had taken on themselves to supply that city with water, which was found to involve a greater expense than the inhabitants were willing voluntarily to defray; and the consequence was, that they obtained an Act of Parliament, which enabled them to tax the owners or occupiers of houses in *Dublin*, for supplying themselves with water, a service which was for their own benefit; and it directed, amongst other things, that the commissioners, who were to receive that money, (the corporation in this case fulfilled the office of commissioners), the parties who received the money, were annually to render to the Lord Lieutenant accounts of the moneys they received and expended, and which accounts he was to lay before Parliament. An information was filed against the corporation, insisting that they had improperly applied large sums of money raised under these powers, and praying that the corporation might be declared trustees of the rates and rents referred to, and that the funds alleged to have been improperly applied might be replaced. The corporation, by

(a) 1 Bligh, N. S. 312.

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their answer, said that their accounts had been submitted to the control and inspection of the commissioners for auditing public accounts, as they believed by direction of the Lord Lieutenant; and the corporation denied the jurisdiction of the Court of Chancery on the subject. The report states, that, at the hearing of the cause, the respondents, that is, the corporation, having by their counsel insisted that they were not trustees of the rates, and that the uses for which the same were granted were not charitable in their nature, the Court dismissed the information, with costs, on the ground of its want of jurisdiction (a). The case came before the House of Lords on appeal from this decision. It was, upon appeal, held clearly that the jurisdiction of the Court of Chancery could not be ousted by the mere fact of its being directed by the Act, that there should be other parties to whom the commissioners were to account (b); but Lord *Eldon* and Lord *Redesdale*, who delivered the judgment of the House, throughout adverted to and considered the cases of *The Attorney-General v. Heelis* and *The Attorney-General v. Brown*. Lord *Eldon*, first, during the argument observes, that he thought that the duties which were the subject of the suit in *The Attorney-General v. Brown*, were a gift to a charitable use, although the judgment rested on other grounds (c). He then remarks, "The case of *The Attorney-General v. Heelis* weakens the authority of *The Attorney-General v. Brown*, because much of the doctrine of the *Vice-Chancellor* in the former case is not reconcileable with the principle of the decision of *The Attorney-General v. Brown* (d); and again, at the final delivery of the judgment of the House, Lord *Eldon* says, "When this case was argued at the bar, two cases were cited which had been heard in the Court of Chancery in *England*, one before myself, the case of *The Attorney-General v. Brown*, and another I believe by the present

(a) 1 Bligh, N. S. 330.

(b) Id. 333, 336.

(c) Id. 334.

(d) Id. 335.

Master of the Rolls, *The Attorney-General v. Heelis*; and it is but fit to state, that, although I was of opinion in that case of *The Attorney-General v. Brown*, that the purpose for which certain tolls were appropriated was a purpose that made the establishment of those tolls an establishment for a charitable use; I was of opinion it was not necessary it should be charitable, to give the Court of Chancery jurisdiction upon the subject. But my judgment in that case proceeded upon this ground, that the Court had jurisdiction to call upon persons intrusted with the application of those tolls, which were granted for the purpose of supporting banks, to protect the land from the inroads of the sea. I thought that the Court of Chancery had a right to direct an account of those tolls to be taken. The authority of that case is considerably weakened by the opinion given by the present Master of the Rolls, then *Vice-Chancellor*, in the case of *The Attorney-General v. Heelis*, inasmuch as the reasons on which he proceeded were considerably different from those on which the judgment was founded, which I thought myself bound to give in the prior case of *The Attorney-General v. Brown* (a)."

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Now, it is material to look at the two cases thus distinguished from each other, for the purpose of seeing what is the difference between them. It is clear, that both of the learned Judges came to the conclusion that the cases of tolls and rates then before them, were cases of charitable use. Lord *Eldon*, in *The Attorney-General v. Brown*, says, "Supposing the case rested on this, one great question is, whether this Act of Parliament, in respect of the coal duty, would create a charitable use? It seems to have been considered, that, because the duty was given by Act of Parliament, it could not be a charitable use. If authority was wanted upon that subject, it would be enough, for my

(a) 1 Bligh, N. S., 334.

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business to-day, to refer to the passage cited from *Duke's Exposition of the Statute of Elizabeth*. After the fire of *London*, when Acts of Parliament imposed a duty on coal imported into the city or river, among other purposes, for rebuilding *St. Paul's Church*, beyond doubt that was a charitable use (a). Money given by a private donor for repairing a church or chapel is a charitable use; and, if this is law, there is no reason why money given to the public, if it is applied to a charitable purpose, should not be equally within the statute of *Elizabeth* (b). He says again,—“I confess, therefore, that, unless I hear more to convince me of the contrary, in my opinion this is a charitable use within the statute of *Elizabeth* (c).” And, in finally giving his judgment on the case at a subsequent period, referring to the passage, Lord *Eldon* said,—“I believe that the passage cited [from *Duke*] was a construction of the Act by the very individual who drew it. The question comes to this, whether here is a charitable use; a grant within the terms of the statute of *Elizabeth*? If it is, *cadet quæstio*. On the words of the statute the following commentary is extracted from the readings of Sir *Francis Moor*:—‘Ports and havens; such only as tend to safety of ships of sail, not other vessels; and creeks for harbour, which are implied to find lights to guide ships into the haven, is a charitable use within these words. An imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens, where they shall land, is a charitable use, and within this statute.’ I should be glad to know whether an impost in aid of the poor inhabitants of *Brighton*, to repair groynes for the preservation of the town, and enabling ships to land goods there, is not within the terms of this construction of the statute? I have heard nothing which prevents my concurring in the opinion that

(a) 19 Car. 2, c. 3; 22 Car. 2, c. 22.

c. 11; 1 Jac. 2, c. 15; 8 Will. 3, (b) 1 Swanst. 297.

c. 14; 1 Ann. st. 2, c. 12; 9 Ann. (c) Id. 299.

a parliamentary grant, destined to such purposes, is a gift to charitable uses. If that doctrine is to be contradicted, it must be done by higher authority than mine (a).” Now, Sir *John Leach*, in the *Attorney-General v. Heelis*, says, “I am of opinion that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by Courts of equity. It is not material that the particular, public, or general purpose is not expressed in the statute of *Elizabeth*, all other legal, public, or general purposes being within the equity of that statute (b);” and he cites cases illustrative of that proposition. He then proceeds to add,—“I am of opinion, that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable, and that funds derived from the gift of the Crown, or the gift of the Legislature, or from private gift, for paving, lighting, cleansing, and improving a town, are, within the equity of the statute of *Elizabeth*, charitable funds to be administered by this Court. But where an Act of Parliament passes for paving, lighting, cleansing, and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised, being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered by this Court (c).” The difference of reasoning to which the remarks of Lord *Eldon* in *The Attorney-General v. The Corporation of Dublin*, apply, consists in the distinction taken by Sir *John Leach*, that you are to look at the source from which the funds proceed, and not merely to their object. However, Lord *Eldon*, in the case of *The Attorney-General v. The Corporation of Dublin*, adheres distinctly to the view which he

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(a) 1 Swanst. 307.

(b) 2 S. & S. 76.

(c) Id. 77.

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had taken in the earlier case; and there can be no doubt that the conclusion of the House of Lords was, that the mode in which the rate was levied was not to be looked at, but the purpose to which it was to be applied; and I apprehend the purpose must be the real criterion. If a number of persons assemble together to make a square, as suggested by Mr. *Rolt*, or to allot a portion of building ground belonging to themselves in any particular manner, then if, to obviate the difficulty of raising or collecting subscriptions to the square, they apply for and obtain an Act of Parliament, giving the power of levying on every person inhabiting the houses which are about to be built on their own property, and thus compelling them to contribute and pay rates towards the maintenance and improvement of that property into whatever hands it may pass, the purpose is a distinct private purpose for the exclusive benefit of those individuals who are dealing with their own property, or those who may subsequently acquire interests under them. But when you come to the purpose of paving and lighting a town, which is for the benefit of all the inhabitants,—for the benefit of the poor inhabitants who walk through the streets, and of others who may resort there from all the neighbourhood,—persons who drive their carts and waggons through the streets, including the mail coaches or other vehicles that have to pass through the town, and in fact every class of the Queen's subjects,—one does not need then to look at this recital, by which we are told, that amongst other things there will be benefited the *Royal Naval Hospital*, the *Royal Marine Barracks*, and other public establishments. It is sufficient to say, it is a large and general purpose for this town, although not beyond the limits of the town, and that, for that purpose, certain moneys are to be levied. I cannot see that the source from which those moneys are here derived, namely, from taxation, can make any difference as to the charitable or public nature, and which would be attributable to the funds if they proceeded from a more limited sphere of

bounty; and, if there be no distinction on that ground, the Attorney-General is the proper person to represent those who are interested in that general and public or charitable purpose.

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It is then observed, that the proceeding in *The Attorney-General v. The Corporation of Dublin* was by information and bill. It does not appear to me to be necessary that there should be a bill in respect of those rates. No person can say that any given individual could be entitled to have the rates refunded. What is said is this:—the Attorney-General comes here to protect this fund. He says:—I represent the public in respect of a fund which by law is applicable to the public purpose of lighting and paving, and keeping up the other objects mentioned in this bill, which ought to be maintained,—that is a strictly charitable use in every sense which the Court would protect,—and I insist on having no portion of that fund diverted for any other purpose.

The next question then is, whether the fund is now proposed to be diverted from the purposes sanctioned by the Act? That is also concluded by authority. Any distinction to be drawn between *The Attorney-General v. Andrew* (a) and this case would be too fine; and I should not be acting with that discretion which I think ought to guide every judge, whatever may be his own views, if I attempted to escape from such conclusion by refined distinctions of that description. I confess, that, before that case was decided, it might have seemed reasonable that the course should be pursued which has been uniformly pursued, I believe, by every public body that has had funds given to them for certain public purposes,—such as paving and lighting, namely,—that if they find bonâ fide

(a) 2 M'N. & G. 225.

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and in the fair exercise of their discretion, they being the parties authorised to administer the fund, that there is a slip in their Act, or if from any other reason they find it necessary to apply to Parliament again, it might then fairly be considered that they are rightly acting in so carrying into effect the original purpose designed by the Act under which they are constituted. Mr. *James* put the case of a mistake or omission of a piece of land from a schedule, or of some other possible error. I have known such a case occur as the word "not" having been found in the wrong place in an Act of Parliament, and of another Act being necessary to get rid of it; and it would seem strange to say in such a case, that you were so strictly tied down by general terms to the application of money in the way specified by the Act in question, as to be unable to go to parliament for the supply of a manifest defect. But it can only be remedied hereafter by taking care to put in a special provision that the moneys may be applied in some manner for the purpose of obtaining a future Act of Parliament, if necessary. Independently of decision, I cannot but say that one might have thought, that, looking on the parties as trustees *bonâ fide* carrying into effect the general purposes of their Act, they would be as well justified as charity trustees would be in seeking to carry into effect a new scheme, where a new scheme was wanted; however, it is now settled by authority, and it is quite impossible for me to entertain judicially any other opinion than that which has been expressed by the other decisions, that you must look to the clauses in the Act, and that you cannot go out of those distinct and express clauses upon any notion that the trustees are justified in applying their money in a way beyond the express and literal terms of such clauses.

I am bound therefore to look at the 128th section of this Act, to see what the commissioners may do with these funds; and there I find everything clearly pointing out the

expenditure under and by virtue of the Act; clearly contemplating nothing dehors the specific terms of the Act itself. The 128th section begins with saying that the commissioners are to apply the money in paying all the costs incidental to the purposes of the Act, in paying off all the debts and demands under the Act, and then in paying for the materials, and so on,—all the modes of application being specifically pointed out by the Act, coming down to these parts of the clause on which reliance has been placed,—“All other costs, charges, and expenses relating to or incident to the execution of this Act, and the powers and authorities hereby given and granted to the said commissioners,” “and in and for carrying the intents and purposes of this Act into full and complete execution in other respects.” Now, it is said, that we may separate the general intents and purposes of the Act, namely, draining, lighting, paving, and the like,—take them to be general purposes of the Act,—and separate them from the special purposes sanctioned, limited, and pointed out by the Act, and say—the general purpose was to be the draining and lighting of the town; and therefore any new application for the purpose of the Act, the better paving and lighting, is in effect only applying it to carrying the intents and purposes of this Act into full and complete execution. I do not think that would meet even the liberal sense and interpretation of the words, straining them to the utmost; because you are to carry into effect the purposes pointed out by this Act not by some other means, but by carrying the Act into full and complete execution. Now, the very purposes of this Act are simply, so far lighting, paving, and draining, as the Act authorises you to do, and no further. Plymouth might be extended, you might wish to carry out the operations of the Act beyond its present limits, and you may say—we have not money enough to do it. The answer would be, carry into effect draining as far as two shillings in the pound will enable you to do so.

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The Act entitles you to do all you can for the two shillings, but it does not authorise you to pay any part of the money in applying for power de hors and beyond the Act. And I should be drawing a distinction, as I said just now, which it would be impossible to maintain, if I read these words in a manner different in substance from the words in *The Attorney-General v. Andrews*. In the beginning of the clause in that case, the parties are authorised to expend the money after payment of charges for "the carrying into execution the purposes of the Act" generally; and then at the end of it there is this expression, "and erecting new works and otherwise carrying this Act into execution"—the phrase remarked upon by the Court (a), which is a little different from the earlier expression in the same Act, "the carrying into execution the purposes of the Act" (b), and might possibly be said to involve a necessity for other proceedings. The whole clause was, however, before the Court; and I cannot suppose that any part of it was omitted from its consideration, nor do I think the literal construction goes so far as has been contended. I think I am bound by the decision which I have referred to.

It was then suggested by Mr. *Kinglake*, that, as you are allowed, on the authority of *Bright v. North* (c), to oppose an Act of Parliament, and thus protect your property,—as a trustee is allowed or required to defend an ejectment at the expense of the trust,—therefore you may defend yourself in any other manner you think proper. He says, there is a considerable analogy to that case here, inasmuch as Parliament has made an aggression on the commissioners by a public Act,—the Municipal Corporation Act, which they had no opportunity of opposing, and which they would have opposed if it had been a private Act; and as a public Act of Parlia—

(a) 1 M'N. & G. 221.

(b) Id. 226.

(c) 2 Ph. 216.

ment has reduced their rating power from two shillings to one shilling and threepence,—all, he says, that they want is to restore their old rating power of two shillings; and therefore in truth they are only doing what they should have been doing if a private Act to narrow their powers had been brought in instead of a public Act. That is not a sound application of the reasoning on which *Bright v. North* is founded. You must deal with these things as you find them, affected or not affected by an Act of the legislature; and whatever the legislature has subsequently done, I must assume as if it had been the state of things when this particular Act was passed. I must assume the wisdom of the legislature to have embraced every view of the subject. If the commissioners or the inhabitants could not oppose the general Act in one way, Parliament allows them to make themselves heard in another; and they could have been heard by their representatives, by petition, or otherwise. And I must now take the existing Act of Parliament and existing parties as if the Municipal Corporation Act had passed before instead of after the particular Act, and as if the original Act had limited the rating to one shilling and threepence in the pound.

Independently, however, of the general principle in this case, if one had to find a further reason for it, it was in the nature of a bargain on the part of the legislature: it does not diminish the rating power. The legislature took off the watching, and they said, “Parliament has granted commissioners all over the country rating powers for certain purposes, lighting, paving, and watching,—now we are going to exonerate them from a part of the burthen, and we will take off a part of the rating power, and, accordingly, make an average calculation of what has been spent for all the purposes originally contemplated, except that from which you are relieved; and reducing the amount to that extent,

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you reduce the parties to the footing of their original parliamentary contract. Parliament contracted to give them two shillings for doing a certain duty, and, having afterwards relieved them from a portion of that duty, the charge is in justice set right by taking off a part of the rate.

The only remaining observation is as to what was said with reference to the delay. The case is very different from those circumstances of delay which I have thought and shall still think it necessary to act upon,—where parties are coming here in cases of trade marks and copyrights, and where there may be legal rights to try and to establish, and the consequence of coming so late is, that they seek by a summary process to interfere with parties to whom such an interference may be doing an irreparable injury; whereas, if they had come at the proper time, the whole matter might have been decided at the hearing (whether it will be so under the new practice is a different question), which the Court assumes is the more correct and full mode of determining rights between all the parties. But in this case it is more in the nature of waste. As I observed during the argument, if a man had allowed half his trees to be cut down before he applied, the Court would not therefore allow the remaining half to be cut down; and if they have a right, as I think they have, to say, “this is our money,” I apprehend it is not too late to come and stop it. Notwithstanding the remark, that everybody who knew that an Act was going to be applied for by the commissioners would have a shrewd suspicion that it was to be paid for out of the funds, I take it, that, in law, they would have a right to suppose it was going to be paid for correctly, and that anybody coming here by bill or information to stay by injunction a proceeding with reference to an Act of Parliament before a farthing was expended, would certainly be told he had come too early. The Court would say, that they had a full right to

apply to Parliament at their own expense; and it might have been argued, that, until some of the money in question was applied, there was not the slightest reason for interference by injunction.

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LET an injunction be awarded to restrain the Defendants, the commissioners, &c., their treasurer, clerks, and agents, from paying or expending any moneys, being part of or arising out of the rates levied or to be levied under the said Act, of, for, or towards, or in respect of any costs, charges, or expenses whatsoever, incurred or to be incurred in or about the preparing, promoting, or prosecuting of the bill in Parliament, &c., or incident thereto, and also from drawing, indorsing, or signing any cheque or cheques, order or orders whatsoever for payment thereof, or taking any steps or proceeding whatsoever for procuring such payment until this Court make other order to the contrary.

Minute of
Order.

Injunction made perpetual. Sums referred to ordered to be refunded by the Defendants, (except *Eastlake*).

Decree.
Dec. 8th.

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June 11th.

HAWKSBEЕ v. HAWKSBEЕ.

One, after occupying a house for several years as tenant from year to year, found no one to receive the rent for fifteen years before his death, and devised the premises (with power of sale under such conditions as might be thought expedient) for the benefit of his wife and children. His eldest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow died; and it was held, that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the premises adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold and distributed according to the directions of the testator.

ON a claim for the execution of the trusts of the will of *William Hawksbee*, a question arose with respect to the sale or disposition of a house in *Whitecross-street*. The testator had entered into the possession of the house as tenant from year to year, in the year 1810, and had paid the rent into *Drummond's* bank, under the directions of his landlord to that effect, until the year 1822. In that year, *Messrs. Drummond* informed the testator that the customer of the bank, to whose account the rent had been paid, was dead, and that they had no longer any authority to receive it. From that time the testator continued in the occupation of the house without paying any rent, until his death in the year 1837. The testator by his will devised and bequeathed his real and personal estate and effects, upon trusts for the benefit of his wife and children, the wife being thereby tenant for life of a portion of the estate, and the children tenants in common of the residue, and giving his devisees in trust power to make a lease of the house in question, or sell it under such conditions as to title as they may think fit. Some of the children were infants at the death of the testator. The devisees in trust did not, after his death, sell the house; but the Defendant *Francis Hawksbee*, the eldest son of the testator, who took a share of his estate under the will, carried on the business in the same premises, and paid rent for the house to the widow of the testator until her death in the year 1852. The Plaintiffs, the other children of the testator, then filed their claim for the execution of the trusts of the will, including the sale of the house. The Defendant, the eldest son, claimed a possessory title to the house in respect of his occupation from the year 1837, and denied the title of the testator to devise it by his will.

Mr. *Welford*, for the Plaintiffs, argued, that the Defendant, having acquired his possession of the house with the consent of the trustees and the widow, and having paid rent to the latter in conformity with the directions of the will, could not repudiate the title of the testator.

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Argument.

Mr. *Glasse*, for the Defendant, argued, that the title claimed by the Plaintiffs, whether under the will or otherwise, although plausible at the first view, yet when analysed would be found to be wholly without foundation. The testator was a tenant paying rent until 1822; and his possession from 1822 until his death, a period of no more than fifteen years, was not enough to establish an adverse title. No estate could therefore pass by his devise or attempt at devise. From 1837 the Defendant had been in possession, and though it was true that he had paid rent to his mother, yet that could not confer any title upon the Plaintiffs. They did not claim under the widow,—nor had the widow in fact attempted to assert any title in herself. She had left the Defendant in possession, and tacitly given him all the rights which that possession had created, by making no devise of the premises. The question therefore amounted simply to this,—whether the Court would interfere by a kind of equitable ejectment to deprive the Defendant of a property in which he had gained a good possessory title, and which, according to the principle recognised at law in ejectment, he was entitled to hold until he should be ousted by a superior legal right.

The VICE-CHANCELLOR said, that there might have been difficulty in the case, if the possession of the Defendant had not been connected with that of the testator; but this was done by his payment of rent to the widow. The widow had an interest in the rent or produce of the premises in

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 —
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question during the minority of the children; she was tenant for life of a portion of the estate under the will, and had taken the benefit of that bequest, and it was not competent to her to set up an adverse title in herself as occupant, or allege that the testator had no interest in the property. The Defendant had entered into and continued in possession as the tenant of the widow,—and the Court would not permit him to obtain possession under the operation of a will, and afterwards say that he had acquired the property under a different title. The sale must be made according to the directions of the testator.



June 10th &
 13th.

BURKE v. ANNIS.

A testator by his will, dated in 1819, devised his freehold estate as follows:—
 “To my daughter *Henrietta* I bequeath the house I live in, being No. 11,” &c.; “to my daughter *Martha* I bequeath my house No. 10,” &c.; “but it is my will that the same be placed in trust,

A SPECIAL CASE.—The testator, *John Bolton*, being at the time of making his will and of his death seised in fee simple in possession of two freehold messuages, No. 11 and No. 12 in *Greek-street, Soho-square*, in the former of which (No. 11) he resided, devised and bequeathed his real and personal estate by a will in the following words:—“Oct 3rd, 1819, *Greek-street, Soho, London*. I hereby declare this to be my last will and testament. To my daughter *Eliza* I bequeath 5s.; to my son *John* 50*l.* a year for two years (to be paid half-yearly), and 200*l.* to be paid him when twenty-five years of age. To my son *David Morton* and that they shall only receive the rent during their life.” “In case of *Henrietta’s* death without leaving behind her more than one child, then the said house No. 11 shall revert to my son *David*, son *John*, and daughter *Martha*, in equal shares; but if she leaves more than one, (be it one, two, or more,) they shall all share alike the said property left to the mother; but suppose that none of them live to twenty-one years of age, the said property shall revert to *David*, *John*, and *Martha*, as before mentioned.” *Henrietta* survived the testator, and died, leaving two children, of whom one lived to attain the age of twenty-one years, and the other died under that age:—*Held*, that the two children of *Henrietta* took an estate in fee simple in possession in the house No. 11.

I bequeath my business, with medicines, shop, fixtures, utensils, and everything belonging to the business, likewise my books and wearing apparel, and if he chooses to live in the house I now reside in he shall occupy the same for five years at the rate of eighty guineas per annum (clear of all deductions whatsoever); likewise, if he chooses, he may take all my wine at 50s. per dozen, and pay for the same in twelve months: if he declines taking it, it must be sold. To *Edward Armstrong* and his brother *John* I bequeath each 100*l.* when they arrive at twenty-one years of age; but if they die before, the same shall be divided between my son *David Morton*, daughters *Henrietta* and *Martha*. To my sister *Catherine Foster* I bequeath 20*l.* To my daughter *Henrietta* (now Mrs. *Burke*) I bequeath the house I live in, being No. 11 *Greek-street*. To my daughter *Martha* I bequeath my house No. 10 *Greek-street*, but it is my will that the same be placed in trust, and that they shall only receive the rent during their life. I name my executors to be the trustees (my son *David Morton* and Mr. *John Fergusson*, of *St. Martin's-lane*, I request to be my executors). In case of *Henrietta's* death without leaving behind her more than one child, then the said house No. 11 shall revert to my son *David Morton*, son *John*, and *Martha*, in equal shares; but if she leaves more than one (be it one, two, or more), they shall all share alike the said property left to their mother; but suppose that none of them live to twenty-one years of age, the said property shall revert to *David Morton*, *John*, and *Martha* as before mentioned. With respect to *Martha*, if she die without issue, or if none of her children live to the age of twenty-one years of age, then the property shall revert to *David Morton*, *John*, and *Martha*, as before mentioned; if my son *David Morton* wishes to continue in the house No. 11, he shall enjoy the use of any furniture, linen, plate, &c. for one year—an inventory of the whole being taken and then to be disposed of,—my book debts to be collected,

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and wish my son *David Morton* to do it, for which he shall receive five per cent."

The testator died in 1821, leaving his daughter *Henrietta* (Mrs. *Burke*) surviving.

The said *Henrietta Burke* died in 1821, and left issue her surviving only two children, namely the Plaintiff *Edmund Burke*, and *Henrietta Aphorpe Bolton Burke*, and without having had issue any other child.

Henrietta Aphorpe Bolton Burke died in December, 1835, without having attained the age of twenty-one years, and intestate, and leaving the said Plaintiff *Edmund Burke*, her only brother, her heir-at-law.

The Plaintiff *Edmund Burke* attained the age of twenty-one years in March, 1840. In February, 1853, the Plaintiff contracted to sell to the Defendant *John Annis* the house, No. 11 in *Greek-street*, aforesaid, and the inheritance thereof in fee simple.

The case stated, that the Defendant had objected to the title of the Plaintiff to the house, on the ground, that, according to the true construction of the said will, the Plaintiff and his deceased sister *Henrietta Aphorpe Bolton Burke* did not, under the devise thereof therein contained, become, upon the decease of the testator's said daughter *Henrietta Burke*, seised of or entitled to the fee simple in possession of the same; and he therefore insisted that the Plaintiff could not make a good title to the messuage or tenement without the concurrence of the heir-at-law; and the opinion of the Court was therefore required, whether the Plaintiff and his deceased sister *Henrietta Aphorpe Bolton Burke* did or did not, on the decease of the testator's daughter

Henrietta Burke, become seised of or entitled to the premises No. 11, *Greek-street*, for an estate in fee simple in possession under and by virtue of the devise thereof contained in the will.

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Mr. *Chandless* and Mr. *Haldane*, for the Plaintiff, submitted, that the children of *Henrietta* took the fee by implication. They cited *Doe d. Elsmore v. Coleman* (a), and also the principle the reason of which was thus stated by Mr. *Preston*, "If the testator had intended the estate of *A.* to determine by his death, no reason existed for any provision against his death under age. By marking that event as the contingency on which the estate should revert to the heirs, or be enjoyed by any other person, it necessarily must be understood that he intended that his heir, or the substitute, should not have the land in any other event; and of consequence, that the devisee should have an estate in fee, subject only to that restriction:" 2 *Preston on Estates*, 252; 2 *Jarm. Wills*, 225, 2nd edit.

Argument.

Mr. *Rolt* and Mr. *Younge*, for the Defendant.—The construction which the Courts now adopt is not precisely the same as that which might have been formed at an earlier period. Lord *Mansfield* drew inferences from expressions in wills which would not now be drawn. The present course is to take the plain meaning of the words,—adding every necessary implication, but going no farther. If an estate be given to *A.*, and if *A.* should die under the age of twenty-one, then to *B.*,—how can it be called a "necessary implication" that the intention is to give the fee to *A.* in any other than the single event indicated? Where is the "necessity" of the implication? The testator may well say, if *A.* should die under twenty-one, *B.* shall have

(a) 6 Price, 179.

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the estate, without intending to give the fee to *A.* Many reasons may operate in his mind in making the devise to *B.*, in the event mentioned, which might in no respect operate to induce him to extend the life interest of *A.* in all other events. There may, therefore, as in this case, be a devise over in a particular contingency, without any design of disinheriting the heir in any other event. There is, moreover, this circumstance in the other cases in which this implication has been raised, that the limitation over has been in fee,—clearly therefore intimating that it was not the intention of the testator that the heir should take any interest if that limitation took effect,—and thence it might be more reasonably, and by an easier step, inferred that nothing was reserved to the heir in any other event. Now, in this case, the gift over is of the “said property:” what is the “said property”? That which is before given to *Henrietta*,—and if *Henrietta* had only a life interest, neither can the gift over which refers to it, and is measured by it, be greater than a life interest. In *Fowler v. Blackwell* (a), where there was an indefinite devise to the testator’s son *George*; and if he should die before attaining twenty-one, then the land to descend to his son *Richard* and his heirs; although the note in *Saunders’ Reports* was cited, yet the Court held that no one should take against the heir of the testator, without an express devise to him.

Judgment.
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VICE-CHANCELLOR:—

The question raised by this case is on the effect of the devise of the house No. 11, *Greek-street*, to the children of *Henrietta*, the daughter of the testator, followed by the devise over of the same property to other children of the testator, in case *Henrietta* should leave no more than one

(a) Comyn’s Rep. 353.

child, or if, leaving more than one child, none of them should live to attain twenty-one. It is admitted, that it has been laid down in several cases, that, where there is an indefinite devise to *A.*, and if *A.* die under twenty-one, then over,—the meaning of such a form of expression is, that the estate of *A.* is intended to continue except upon the happening of the event which the testator has mentioned, and that he takes a fee simple. It is argued, however, that, this being a question between vendor and purchaser, a sufficient degree of doubt has been thrown on the authorities to which I have referred by the modern disposition to give effect only to the strict words of the testator, to prevent the Court from interposing on behalf of the vendor to enforce a specific performance of the contract, or hold that the purchaser is bound to accept a title founded upon the devise contained in this will. The Court has no doubt felt the difficulty of the purchaser's position, in being called upon to discuss questions of title in the absence of the parties interested in supporting the particular construction which gives rise to the doubt; but, on the other hand, it can hardly be denied, that the weight given to a mere possibility of doubt has sometimes been productive of great grievance to vendors, in withholding from them the aid of the Court in giving effect to titles reasonably safe.

In the present case, however, I cannot entertain any doubt, that, if the authorities which have established the rule of construction I have referred to come to be reviewed by a higher Court (and it must be the very highest Court which alone can reverse them), that Court will, upon a consideration of the cases which have been decided, and the principles of those decisions, affirm the rule.

The fallacy in the argument which has been addressed to me on the part of the Plaintiff seems to be this,—that it sets out with the assumption that the gift to the

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children of the daughter is a gift for life; and that it is necessary to find some other words in the will which shall distinctly enlarge the estate for life thus originally given: but this is not the state of the case with which we have to deal. The first gift to the children does not limit the estate which they are to take to an estate for life, but, by the indefinite language which is used, creates an estate the extent of which is doubtful,—and which, even if the estate might have been limited to a life estate, if nothing more appeared on the will,—yet, when taken in connection with other expressions of devise as to the same property, shews that the testator intended, by his first disposition of the property, to give a larger estate than a mere estate for life. It was a rule, established at a very early period, that where an estate was devised subject to a charge which might exceed the benefit, although there were no words of inheritance, yet the devisee would take a fee. No subsequent application of this principle of construction has been much stronger. In *Collier's case* (a), the testator devised “part of the land to his daughter, and the other parts to his wife for life, with the profits whereof she should bring up his daughter; and that after his death it should remain to his brother, paying to one 20s., and to others small sums, amounting to 45s. in all.” It seems to have been found, that the land was of the value of 3*l.* a year, and it was held that the brother had the fee simple. It is said, that, in such a case, after payment, he may die before satisfaction, and therefore it is a fee simple. If it had been absolutely necessary to construe the gift without words of inheritance to amount only to a life estate, the mere charge could not have had the effect of enlarging it.

The case of *Purefoy v. Rogers* (b) was stronger than the present case, for there the gift over was to the testator's

(a) 6 Co. 16.

(b) 2 Saund. 380.

heir; and it is reasonably observed in the note, that, "if he had meant to give only an estate for life to the son, it would have been to no purpose to appoint the tenements to remain to the right heirs of the devisor, if the infant should die within age, for the law would have directed it without the appointment of the devisor; and therefore when the devisor makes a special appointment of it, it ought to be intended that the devisor gave a fee to the son" (a). The same construction was afterwards adopted where the gift over was to a person other than the heir, or to a stranger. In *Frogmorton v. Holyday* (b), there was the indefinite gift of a house and garden chargeable with the payment of a sum of 50*l.* to the testator's daughter out of the yearly rents, issues, and profits, which it had been held would not of itself pass the fee to the son; but Lord *Mansfield* lays the stress of his judgment on the gift over to the three daughters, in case the son should die in his minority, following the indefinite devise to such son. If there are no words of limitation, and nothing else appears, he says the devisee can only take an estate for life; but if a gift over be found, determining the estate only in a certain event, as the death of the first devisee under twenty-one, the time of such death being immaterial if he were only to take an estate for life, it must then be inferred that the intention was to give him a larger estate than an estate for life, and that could be nothing less than the fee simple.

The principle of this decision is adopted and followed with marked approbation, by Lord *Ellenborough*, in several cases:—*Doe d. Wight v. Cundall* (c), *Robinson v. Grey* (d) *Toovey v. Bassett* (e), *Marshall v. Hill* (f). In the latter case, Mr. Justice *Bayley* notices the language of Chief Justice *Willes*, in *Moore v. Heaseman* (g), that, if there were

(a) 2 Saund. 388 b.

(b) 3 Bur. 1618.

(c) 9 East, 400.

(d) Id. 1.

(e) 10 East, 460.

(f) 2 M. & S. 608.

(g) Rep. t. Willes, 138.

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any doubt on the words which charged the devisee with payment of a gross sum, the subsequent words, "in case all the three daughters die before their mother, that it shall descend to the heirs of the mother," had put it beyond all dispute, and plainly shewed the intention of the testatrix. For if she intended that the daughters should be only tenants for life, and consequently that it should go to the heirs of the mother, whether the daughters died before the mother or not, it would have been most absurd in her to say that it should go to the heirs of the mother in case the daughters die before her. And that was exactly agreeable to what was said in *Purefoy v. Rogers*, of which he approved; and Mr. Justice *Bayley* further observes, that, in *Moore v. Heaseman*, the limitation over was not to the right heirs of the deviser, but of his sister. The Queen's Bench, therefore, certified to the Court of Chancery, that the devisee whose interest was in question took a remainder in fee.

It was said that there might be reason for giving the devisee a life interest, and not for giving him an estate in fee. The devisee might, if he attained the age of twenty-one, become entitled to other property, from which the testator may deem him otherwise sufficiently provided, without necessarily giving him the fee. But this is rather what is called, by Chief Justice *Willes*, "a foreign and not a natural construction" (a); and the Court has never been astute to discover such reasons. The operation of a devise, like that in the present case, to create an estate in fee is established by a long course of decisions, and is supported by the authority of Lord *Mansfield*, Lord *Ellenborough*, Chief Justice *Willes*, Mr. Justice *Bayley*, and other eminent Judges. Some of these cases have been sent from Chancery to the Courts of law, and there is no reason for supposing that the Court of Chancery did not adopt the determination expressed in the certificates. I think it extremely im-

(a) Rep. t. *Willes*, 141.

probable that the House of Lords, if a case like the present were carried before them, would reject a construction sustained by such a weight of judicial opinion and authority; and it appears to me in truth to be so firmly established, that, if it is to be altered, nothing less than an Act of Parliament could do so, without the danger of shaking many titles which depend on the present rule.

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FRIPP *v.* THE CHARD RAILWAY COMPANY.
FRIPP *v.* THE BRIDGEWATER AND TAUNTON
CANAL AND STOLFORD RAILWAY AND
HARBOUR COMPANY.

June 21st,
22nd, 23rd, &
29th.

THE first suit was instituted in March, 1853, by *Daniel Fripp*, on behalf of himself, and all other his co-mort- Where several mortgages were made, under the au-
thority of an Act of Parliament, of a canal navigation and undertaking, and the works, lands, hereditaments, and capital subscription, calls, debts, sums of money, property, estate and effects, belonging, due, or owing, or thereafter to belong, or be due, or owing thereto, and all tolls, rates, and duties arising by virtue of the Acts under which the company was formed,—the mortgagees being equally entitled, one with the other, to their proportions of the tolls and premises,—the Court, at the suit of one of the mortgagees, whose interest had been a long time unpaid, appointed a receiver of the tolls, rates, and duties, and of the estate of the company.

A receiver was appointed by the Court of the rates, tolls, duties, and other property, of a canal and railway company, incorporated by Act of Parliament, notwithstanding that the Act of incorporation provided that a committee of twelve of the proprietors should be elected at every annual general meeting to manage the affairs of the company.

A receiver of the rates, tolls, duties, and other property of the company, appointed by the Court at the suit of a mortgagee, whose interest was long in arrear, notwithstanding the Act of incorporation gave the mortgagee in such a case the specific remedy of applying to and obtaining the appointment by two justices of the peace of a receiver of such rates, tolls, and duties, until the interest in arrear, and the costs and charges, should be satisfied, accompanied by a provision that the act should be without prejudice to any remedies which such mortgagee might have either in law or equity.

It is no objection to the appointment of a receiver over the property of a company, whose business is in the nature of a trade, that the application is made by one of several mortgagees, who, according to the terms of their mortgages, have the legal estate in the property; nor is it any objection that the company has duties to perform, the neglect of which might subject them to indictment, for the order of the Court always gives the parties liberty to apply, whereby any such consequence may be averted.

A receiver appointed at the suit of a mortgagee having a charge of 10,000*l.*, forming about a ninth of the entire mortgage debt of the company, although the other eight-ninths of mortgagees did not concur in the application.

Considerations on the selection of a receiver and manager of the property and business of a company, so as to avoid the appointment of any person whose individual pecuniary interests might conflict with the duties of his office, in respect to those for whose benefit the appointment is made.

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gagees (except the defendant, *George Cooke*), entitled to a sum of 26,000*l.* charged as therein mentioned, against the *Chard* Railway Company, and *George Cooke*, the secretary of the company. The *Chard* canal company was first established in the year 1834, by the Act 4 Will 4, c. liii., under the style of "The Company of Proprietors of the *Chard* Canal Navigation," and was empowered to raise first a share capital of 57,000*l.*, and afterwards an additional sum of 20,000*l.*, with power also to borrow a sum of 20,000*l.* on mortgage in a certain form (*a*). It was by the 71st section of the Act enacted, that a committee consisting of twelve persons should be elected to manage the affairs of the company, which committee, by the 83rd section, was empowered "to contract for and purchase messuages, lands, materials, &c., for the use of the undertaking; to make compensation for damages; to employ, order, direct, place, and displace engineers, surveyors, officers, clerks, servants, agents, and workmen, and to make all other contracts and bargains touching the undertaking, and to use the common seal of the company in such manner and form, and for such purposes as they should think proper, and generally to direct and manage all the business and affairs of the company, and do and perform all acts, matters, and things which the company were authorised to do, save those expressly directed to be done at general meetings of the proprietors." In respect of the mortgages thereby authorised to be made, it was provided by the 91st section that all persons, to whom such mortgages should be made, should be equally entitled, one with the others, to their proportions of the said tolls and premises, according to the respective sums advanced, without any preference by reason of the priority of date of any such mortgage, or on any other account whatsoever; and (by the 92nd section) that the interest of the money, which should be raised by

(*a*) See Sect. 91.

mortgages as aforesaid, should be paid half-yearly to the several persons entitled thereto, in preference to any dividends payable by virtue of the Act to the proprietors; and in case the same or any part thereof should be unpaid by the space of twenty-one days next after the same should become payable, and the same should not be paid within seven days next after demand thereof should have been made of the company, then it should be lawful for any two or more justices of the peace of the county of *Somerset*, and they were thereby required, on request to them made by or on behalf of any creditor whose interest should be so in arrear, by an order under their hands to appoint some person or persons to receive the tolls, rates, and duties liable to pay such interest, until the same, together with the costs and charges of recovering and receiving the tolls, rates, and duties, should be fully satisfied; and the money so to be received by such person or persons was thereby declared to be so much money received by or to the use of such creditor or creditors to whom such interest should be then due; and after such interest, costs, and charges should be satisfied, the power and authority of such receiver and receivers for the purposes aforesaid should cease and determine; provided always, that nothing therein contained should prejudice any remedies which such mortgagees might have in law or equity.

By an Act, 3 Vict. c. i, the company was empowered to raise an additional share capital of 80,000*l.* instead of the first sum of 20,000*l.* referred to in the former Act, and when half of that sum should have been paid to borrow an additional sum of 26,000*l.* by mortgages similar to those in the former Act, or on bond (a); but such loans to be postponed to the mortgages already made in respect of the 20,000*l.* borrowed under the first Act. All the clauses and

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(a) Sect. 7.

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provisions of the first Act, except where expressly repealed, were to extend and operate in respect of the second Act (a); and it was by the second Act (sect. 10) enacted, that the rates, tolls, or duties, should at all times be charged equally and after the same rate throughout the whole length of the canal and works, and no reduction or advance thereon should either directly or indirectly be made partially or in favour of any particular person or company, or be confined to any particular part of the canal or works; but every such reduction or advance should extend to and take place equally throughout the whole canal and works, and extend to all persons whomsoever using the same canal or works.

By the Act 4 Vict. c. x, amongst other powers relating to their works, the company were empowered to be common carriers on the canal (b).

The 20,000*l.* authorised to be raised by the first-mentioned Act was lent to the company by *William Fripp*, the brother of the Plaintiff, in the years 1838 and 1839, in four several sums, and the company duly executed and gave him four several mortgages for the sums of 5,000*l.* each in the form prescribed by the Act.

In March, 1841, the company proceeded to borrow the second sum of 26,000*l.*, of which the Plaintiff advanced two sums, 3,000*l.* and 5,435*l.*, and had transferred to him a security for 700*l.*, which was lent by another member of his family, thus making his entire charge 9,135*l.* These mortgages were in the form prescribed by the Acts, *i. e.* as follows: "By virtue of an Act (4 Will. 4, c. liii), and of an Act (4 Vict. c. x), and particularly by virtue of the secondly recited Act, we, the company of proprietors of the *Chard Canal Navigation*, incorporated by and under the said Acts

(a) Sect. 1.

(b) Sect. 8.

or one of them, in consideration of the sum of 700*l.* to us paid by *S. S. Fripp*, of &c., do assign unto the said *S. S. Fripp*, her executors, administrators, and assigns, the said canal navigation and undertaking, and the works, lands, hereditaments, and capital subscription, calls, debts, sums of money, property, estate, and effects, now belonging, due, and owing, or hereafter to belong, or be due and owing thereto, and all and singular the tolls, rates, and duties arising by virtue of the said Acts, and each or either of them, and all our estate, right, title, and interest, in and to the same, to hold unto the said *S. S. Fripp*, her executors, administrators, and assigns, until the said sum of 700*l.*, together with interest for the same after the rate of 5*l.* for every 100*l.* for a year, shall be fully paid and satisfied. Given, &c."

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The remainder of the sum of 26,000*l.* was advanced on securities in a similar form by eight different persons who were mentioned in the bill, one of whom was the Defendant *Cooke*. By the Act of the 9 & 10 Vict. c. ccxv, the style of the company was altered to "The *Chard* Canal and Railway Company;" and they were enabled to create further shares, and to convert a part of the canal into a railway. By the Act 10 & 11 Vict. c. clxxv, the style of the company was changed into "The *Chard* Railway Company," and powers were given to them and the *Bridgewater* and *Taunton* Canal and *Stolford* Railway and Harbour Company, to amalgamate, or to enter into arrangements for the demise or sale of one undertaking to the other, together with powers to raise a further share capital, and convert the entire canal into a railway.

The bill stated that no part of the canal had been made a railway under either of the foregoing Acts; and that the income of the company arising from the canal was insufficient to pay even the interest upon the first mortgage of

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20,000*l.*, and that no interest had been paid upon the second sum of 26,000*l.* since the year 1842, in which the canal was opened. The bill stated that the traffic had at first been very considerable, but that in consequence of the bad management of the undertaking, independent traders were almost wholly excluded; that *John Farquhar* was the manager on behalf of the Defendants, the *Chard* Railway Company, of their canal and business; and that *Farquhar*, with the other Defendant *Cooke*, the secretary, carried on business in partnership on their own account, under the style or firm of "*The Bridgewater and Chard Coal Company*;" that the coal company were the most considerable traders upon the canal, and in consequence of the official situation of *Farquhar* and *Cooke* had facilities afforded to them, which gave them advantage over other traders, and prevented the due development of the traffic; and the canal was managed by *Farquhar*, with a view exclusively or chiefly to the benefit of the coal company; and that the boats were so regulated and tolls so levied as to afford great advantages to the coal company and amounting to a systematic breach of the provision in the Act. The bill charged that the rates, tolls, and duties granted by the Act ought to be equally levied throughout the line, and should not be reduced in favour of any particular person or company. The bill alleged that the traffic of the canal might be considerably increased if placed under the management of some indifferent person, who would regard exclusively the interest of the company and of their mortgagees, but that the same would not succeed so long as the canal was under the management of the Defendants; that the company, under such management, had no prospect of profits upon their capital, and therefore had no inducement to look to the careful working of the canal. The bill prayed, that an account might be taken of what was due to the Plaintiff and his co-mortgagees for principal and interest; that the company might be decreed to pay the amount by a short

day, or else that the undertaking might be sold, subject to the rights of the mortgagees for the 20,000*l.*; that a receiver and manager might be appointed, to whom the company should deliver over all their books and property and the control of their concern, and that the company might be restrained from interfering in the management, and for general relief.

The bill in the second suit was filed by the same Plaintiff, on behalf of himself and all persons except the Defendant, *Thomas Reynolds*, holding securities in respect of a sum or charge of 89,992*l.* 8*s.* 2*d.* against the company; and *Reynolds*, who had on behalf of himself and the same mortgagees as those whom the Plaintiff claimed to represent, already entered into possession of the undertaking. The bill stated the establishment by the Act of 51 Geo. 3, c. lx, of a company called the "*Bristol and Taunton Canal Navigation Company*," with a share capital of 420,000*l.*, and power to borrow 150,000*l.* on mortgage, in the form therein mentioned (a), or otherwise raise such further sum by shares. That by the Act 5 Geo. 4, c. cxx, the name of the company was changed to that of the "*Bridgewater and Taunton Canal Navigation Company*;" and that by the 2 Will. 4, c. xliii, priority over all other charges affecting the undertaking was secured to the Exchequer Bill Loan Commissioners, for advances to the company to the amount of 15,000*l.*

The bill further stated, that, by the 7 Will. 4, c. xi, the proprietors were enabled to extend their undertaking below the town of *Bridgewater*, and to take in respect of such new undertaking such tolls as the company should from time to time fix, not exceeding the tolls and rates specified in the schedule; and that the Act contained a clause (b) as to the equality of levying the tolls, substantially the same as that

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(a) Sect. 78.

(b) Sect. 22.

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in the 3 Vict. c. i, s. 10 (a); that by this Act the company were authorised to take up on mortgage 100,000*l.*, including the amount already borrowed. The bill stated, that, by the 9 & 10 Vict. c. cxlv, the name of the company was changed to its present name of "The *Bridgewater and Taunton Canal and Stolford Railway and Harbour Company*," and power was given them to make the new works therein mentioned, after provision should have been made for payment of their mortgage debts; but the bill stated that no steps had been taken either to pay the debts or to execute the new works; and the time limited by the last-mentioned Act for the completion of the works was very near expiring.

The bill then stated, that, under the four first-mentioned Acts, the dock, canal, and works thereby authorised were made and completed; and in so doing, the Company expended the sum of 100,000*l.*, or thereabouts, which they were, by the said stat. 7 Will. 4, c. xi, authorised to raise by way of mortgage; that the debt of 15,000*l.*, lent by the Exchequer Loan Commissioners, had been reduced to 10,000*l.*; that subsequently to that advance, and at different times from 1831 to 1842, the company borrowed from different persons divers sums in respect of such sum of 100,000*l.*, and that in particular, in the year 1840, they borrowed four sums of 2,500*l.* each, making, in the whole 10,000*l.*, from the Plaintiff; that in 1836 the company had in like manner borrowed a sum, 1,613*l.* 4*s.* 7*d.*, which afterwards became vested in the Defendant *Thomas Reynolds*; and that all such sums, amounting together to 89,992*l.* 8*s.* 2*d.*, were borrowed on mortgage, in securities of the same form, whereby the *Bridgewater and Taunton* canal navigation and undertaking, and the river *Tone* navigation and undertaking, and all and singular the tolls, rates, and duties, granted, arising, or payable to the com-

(a) *Supra*, p. 244.

pany in respect of the same respectively by virtue of the said Acts or any of them, and all the estate, right, title, and interest of the said company of, into, or out of the same respectively, were assigned unto the said respective mortgagees, their executors, administrators and assigns, until the said respective sums, together with interest for the same after the rate of 5*l.* per cent. per annum, should be fully paid and satisfied, and whereby also the company demised unto the said respective mortgagees, their executors, administrators, and assigns, such parts of the messuages, lands, and tenements, which had been purchased for an estate of freehold and inheritance in fee simple by the company, under their then present, or their former name of incorporation, for all or any of the purposes mentioned in the said Acts, as had not been used for any of the purposes of the same Acts or either of them, and also the lands and hereditaments belonging to the said river *Tone*, or the conservators thereof; provided always, and it was thereby expressly agreed and declared, that the said mortgagees, their executors, administrators, or assigns, should not, in respect of such security, claim in regard to any of the premises comprised in or affected by the same, any preference or priority to any subsequent mortgagee or mortgagees thereof, it being intended and agreed that the mortgagees in general should become entitled equally and rateably, as mentioned in the said first and last-mentioned Acts respectively.

The Plaintiff alleged, that, at the time of making his said advances in 1840, he was told that he could at any time receive his principal money, on giving six months' notice; that he accordingly gave in April, 1845, notice requiring repayment in the month of October following, and that he brought his action to recover the said sum of 10,000*l.*; that in August, 1845, pending the action, *Reynolds*, on behalf of himself and other mortgagees, entered into possession of

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the undertaking, and appointed the said *John Farquhar*, mentioned in the former bill, manager of this undertaking also. The Plaintiff alleged that this step was taken in order to defeat his said proceedings at law, and without the knowledge or assent of the other mortgagees; that, however, he, the plaintiff, afterwards, for some time acquiesced in such possession and proceedings, upon the faith of the representations of the Defendant, that the course he had taken was that which was the best for all parties; that the works, however, had been hitherto unremunerative; that the returns were not sufficient to keep down the interest; and that there was due to the Plaintiff and other mortgagees on the same footing, (irrespective of 10,000*l.* before mentioned), the sum of 89,992*l.* 8*s.* 2*d.*, besides a very large arrear of interest. The Plaintiff further alleged that he had lately discovered the dealings of the Defendants *Reynolds* and *Farquhar*, in respect of the Coal Company, as stated in the other bill. The bill prayed that a receiver and manager of the *Bridgewater* and *Taunton Canal* might be appointed, and that an account of all tolls, rates, and duties received by the Defendant *Reynolds* since the time of his taking possession, and also of all principal monies and interest due to the Plaintiff and his co-mortgagees, might be taken, and payment made of what should be found due to them by a short day, or that the property might be sold, and for general relief.

Argument.

Mr. *Rolt* and Mr. *Osborne*, for the Plaintiff.

The principal authorities referred to in support of the application are mentioned in the judgment. Besides those were the observations of Lord *Loughborough*, L. C., in *Knapp v. Williams* (a), that "The mortgagee would have a right to come into this Court to have an account and a

(a) 4 Ves. 430, n.

receiver appointed. He would have a right, by the aid of this Court, to have the tolls specifically applied to his mortgage;"—an authority cited and approved of by Lord *St. Leonards*, L. C., in *Gibbons v. Fletcher*, 16th July, 1852, affirming the right to a receiver in a suit by the mortgagees of parish rates, under a special Act, and observing, "In my apprehension, the Plaintiffs have this equity, and no other" (a); and *Dumville v. Ashbrooke* (b), in which a receiver was appointed, at the suit of a mortgagee, of the tolls of roads.

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Mr. *Daniel* and Mr. *Piggott* for the Defendant *Reynolds*, in his capacity as co-mortgagee with the Plaintiff, insisted on the fact of the concurrence of the mortgagees other than the Plaintiff; that the course which had been taken, and which was being pursued, was that which was most beneficial for all parties; and they suggested, that, from the circumstances, the Court would assume that the application was made, not in the interest of the mortgagees, but in that of a rival company, desirous of embarrassing and intercepting the traffic.

Mr. *W. M. James*, and Mr. *C. M. Roupell*, for the two incorporated companies, submitted that at least the profits derived from the carrying trade had not been subjected to the mortgages; and that the Plaintiff, therefore, could have no right to a receiver over that part of the concern.

On behalf of the Defendants, in addition to the cases commented on in the judgment, *Drewry v. Barnes* (c) was cited; and with regard to the interposition of the Court after all the circumstances which had taken place, and the long acquiescence of the Plaintiff, *Gray v. Chaplin* (d).

(a) *Gibbons v. Fletcher* is not reported. The above extract is taken from a printed but unpublished note of the case, which was produced in Court during the argument.
(b) 3 Russ. 98.
(c) 3 Id. 94.
(d) 2 Id. 126.

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VICE-CHANCELLOR :—

These two motions, although made in separate suits, came on together ; but as the two cases, although connected in some of their circumstances, as well as by the identity of several of the persons concerned, yet stand on very different considerations, I shall now treat them separately.

First, with regard to the suit against the *Chard* Railway Company. The application is for the appointment of a manager and receiver. The position of the Plaintiff is this : that there is an existing prior mortgage for 20,000*l.*, which has priority over all other mortgages and charges. This is vested in *William Fripp*, the brother of the Plaintiff. The Plaintiff himself is also a mortgagee for 9,135*l.*, and others are mortgagees for 16,865*l.*, making together a sum of 26,000*l.*, authorised to be raised by the second Act of the company, but postponed to the 20,000*l.* raised under the first Act. The Plaintiff has filed his bill on behalf of himself and all other his co-mortgagees in the security for the 26,000*l.*, against the company, and against the Defendant *Cooke*, in order ultimately to establish his mortgages, as against the property of the company, and he has asked by this motion that he may in the meantime be protected by the appointment of a receiver. It appears that the company themselves are in possession of this property, which is almost unproductive in respect of the second mortgages ; and the Plaintiff seeks the appointment of a receiver to secure to himself such benefit as he can from these proceedings.

The first objection was a technical one, as to the necessity of making other parties to the suit. But I will first consider the objections which have been raised in point of principle. It is said that this is a parliamentary corporation, and that it is therefore compellable by mandamus to do all things which it ought to do, and may be restrained

by indictment from acting unlawfully; that the government of the body being vested by statute in the committee of management, there is, in fact, a receiver and manager appointed by the Act itself to perform the functions attributable to such officers, and that what is now asked would be an unauthorised interference with a body so created by parliamentary authority. The case of *Doe d. Myatt v. The St. Helen's and Runcorn Gap Railway Company*(a) was referred to, which came on upon an ejectment brought by a mortgagee of the undertaking, and turned upon the meaning of that word. It was held, that the word "undertaking" did not give to the mortgagee such an interest as would enable him to maintain an ejectment; but observations were thrown out to the effect that it could not be the intention of the Legislature that the mortgagee should have powers which would prevent, as it was said, the purposes of the Act from being carried into execution. The case of *Russell v. The East Anglian Railway Company*(b) was also referred to. That case came before the Vice-Chancellor *Knight Bruce*, and afterwards before Lord *Truro* on appeal, and there appears to have been a strong intimation of opinion by both of the learned judges, that the order for the appointment of a receiver there made, was one which could not be justified, under the circumstances of the powers and authorities of the body. The appointment was in very large terms. The application there was partly on behalf of bond creditors, about whose possession there might be some difficulty. The order was made by consent; and it directed that the receiver was to take and have the management of the estate and effects of the company, and the direction and superintendence of the working of the several railways belonging to or under the control of the company, and all other business of the company(c). The Vice-Chancellor *Knight Bruce*,

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(a) 2 Q. B. 364.

(b) 3 M'N. & G. 125.

(c) 3 M'N. & G. 128.

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upon the application made to him for the committal of the sheriff for interfering, at the suit of a judgment creditor, with the possession of the receiver^(a), suggests whether the order for the receiver might not be against the policy of the law, and illegal as unduly committing a portion of the trust, committed by the Legislature to particular men, to others to whom the Legislature did not intend to confide it; and he says, "The particulars of this order were, I think, not drawn to my attention. It was a consent order, and all I did was to appoint a receiver, not as I believe having any notion of the particular ground on which it should be drawn up,—the terms of which I suspect to be against the policy of the law and illegal." He goes on to say, however, that was not the time for considering whether or not the order should be upheld or preserved intact. The Lord Chancellor observes that he thinks there was good reason for the determination, and that it was not then competent or proper to decide on the objections made to the order^(b). But what the Vice-Chancellor is there turning his attention to, is the largeness of the terms; he says all he did was to appoint a receiver, and that his attention was not drawn to the form of the order. If no receiver can be appointed, the mortgagee in this case will be placed in a very strange position,—certainly one unlike that of any other mortgagee. If this were a mortgage of the undertaking alone, no ejectment would lie,—and, according to the argument, the only other remedy would be having a receiver appointed by a magistrate under the special Act. But then this power is given by the Act expressly without any prejudice to any other rights or remedies which the mortgagee has, either at law or in equity; evidently, I think, supposing that he has some other rights and remedies; and the argument that he has none such, is, I think, therefore not consistent with this part of the Act. The Legislature has sanctioned the making

(a) See 14 Jurist, 967.

(b) 3 M'N. & G. 116.

of these mortgages in the very form in which an ordinary mortgage would be made. Are they now to be turned round and told they have no remedy except what they would get by applying to two justices to have a receiver appointed? I cannot think the legislature intended to sanction such a delusion of parties lending their money to the Company.

[His Honour stated the terms of the instrument(a).]

That is a mortgage in the most complete form possible. The mortgagee would have all the property of the mortgagor, and by a parliamentary enactment, the instrument would carry all the future property of the company as well as what existed at the time of the mortgage. Independently of the question, whether the Legislature authorised a mortgage in such a form, and expressly reserved to the mortgagee, in a particular case, all his other rights and remedies, which would seem to indicate that he had some other rights and remedies, there is in the *Chard Canal and Railway Act*, of 1846(b), an express provision that neither the mortgagees, nor any of the creditors, shall take possession or otherwise obstruct the Company in constructing the works thereby authorised to be executed; which intimates plainly that the Legislature contemplated a case arising in which they might take possession. I think, therefore, a receiver may be appointed by this Court. The appointment of a receiver upon an application to the magistrate would only carry the rates and duties, and that would clearly not be an adequate remedy, nor the only remedy which the mortgagees have.

It was then said, that, independent of the argument on the management being in a parliamentary receiver, and on

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(a) *Supra*, pp. 244-5.

(b) 9 & 10 Vict. c. cxcv. s. 12.

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the grounds of public policy connected with that part of the case,—the appointment of a receiver here is impossible; inasmuch as the Court cannot prescribe everything which is to be done, and the Corporation will be liable to indictment in case the receiver should not carefully keep up the proper repairs of the banks, and attend to the other duties imposed by the Acts. But there can be no difficulty upon these grounds. It is a point which frequently arises, and the liberty given to apply is quite sufficient to protect the Company against anything which is consequent upon the order made by this Court suspending their ordinary powers. It was next urged, that, whatever might be done, the person to be appointed could not be appointed with powers to manage, but only to act as receiver. Against this argument *Jefferys v. Smith* (a) and *Crawshay v. Maule* (b), were cited. In these cases Lord *Eldon* held, that where parties purchase leasehold mines as tenants in common for the purpose of working them, the leases should be considered as partnership property, and therefore a winding up and sale of the concern might be directed, or a person to receive and manage be appointed; and he adverted to the inconvenience of not being able to interfere by appointing a receiver. "How it may be in *Wales*," he says, "I don't know; but in my own country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way?" (c) And on a subsequent day his Lordship says: "It appears to me, therefore, upon general principles, with reference to the particular circumstances of any case, that where persons are concerned in such an interest in lands as a mining concern is, this Court will appoint a receiver, although they are tenants in common of it" (d). And accordingly it was

(a) 1 J. & W. 298.

(b) 1 Swanst. 295.

(c) 1 J. & W. 302.

(d) Id. 303.

referred to the Master to approve of a proper person to be receiver and manager. The form of that order is given in *Seton* on Decrees (a). There is nothing, either in the report of the judgment or in the order, pointing to a sale. The case of *Story v. Lord Windsor* (b) meets an objection which was taken by Mr. Roupell. It was said that the party who had taken the legal title could not come here to have a receiver. Lord *Hardwicke* expressly says, "Though the plaintiff's is a legal title, yet he is proper in coming into this Court, because this is not a title of land, but of a calling, which is a kind of trade, and therefore an account may be taken of the profits here." Further, if this mortgagee enters into possession (as he would have a clear right to do against the Company), he becomes a trustee for the whole body; and he is not compellable to take upon himself the whole administration and management. It is therefore for the advantage of all parties that a receiver and manager should be appointed.

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It was then said, that no complaint had ever been made against Mr. *Farquhar*, and that these proceedings were instituted without warning to him. But he is not managing for the mortgagees. He is managing for the Company, and I do not think the Company are entitled to have or retain possession, as against the mortgagees; and, notwithstanding what was said in argument against the right of the mortgagees to carry on the trade and take the profits which may arise, the appointment of the receiver must go to that extent. The mortgage or charge extends, not merely to the property which the Company possessed at the time it was made, but to "all present and future property." The profits which subsequently accrue to the Company by the exercise of these powers are clearly within the description of future property, thus made subject to these debts.

(a) P. 324, ed. 1; p. 556, ed. 2.

(b) 2 Atk. 630.

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On the objection as to parties, there is perhaps some difficulty. It is said that, although the plaintiff files his bill on behalf of himself and all other mortgagees, yet he has in his bill named all such other mortgagees; and that as they are no more than eight in number, there is no reason why he should not have made them all defendants to the bill: that it cannot be alleged that they are either extremely numerous or unknown. If I thought such a course would be useful to the parties, I should think it my duty to yield to the objection; but I confess I do not see the utility of making all these mortgagees parties. Under the present practice they may, if the plaintiff should be advised to do so, be added to the suit by amendment, and served with a copy of the bill; and such notice is sufficient. Any form of proceeding which would cause unnecessary expense to others the plaintiff ought to avoid, and I cannot say that he is not perfectly right in framing his bill in this form.

The second cause, in which the motion is against the *Bridgewater and Taunton Canal Company*, stands in a different position, from the particular circumstances which have there taken place. The difficulty supposed to be so great in the first case, as to the mortgagees taking possession, has here been practically solved for the last eight years,—the mortgagees during that time having actually been in possession. I am glad to see, from the experience which this case furnishes, that the practical difficulties in the way of the interposition which is sought, are not insuperable. The case stands thus:—Under the pressure of actions brought against the Company to recover monies lent them upon loan notes, it was arranged that a judgment should be given for an amount sufficient to cover all the monies due to creditors of the Company on such loan notes. This being done, Mr. *Reynolds* was placed in the position of mortgagee, by transferring to him the mortgage of a Mr. *Paul*, and was then put in possession, on behalf, as he says,

of himself and all his co-mortgagees of the sum of 89,992*l.*, 8*s.* 2*d.*; and in effect all, except the plaintiff *Fripp*, who holds a mortgage for 10,000*l.*, have signified in writing their acquiescence in that proceeding. This took place in 1845, and Mr. *Reynolds* and his co-mortgagees have been conducting the affairs of the Company ever since, up to the present time, and have appointed Mr. *Farquhar* their manager, the Plaintiff dissenting from this course. The legal position of the mortgagees is this, they are entitled, any one or more of them, to take possession, but whoever does so is a trustee for all the others, they become, as it were, tenants in common; and if they then want a receiver, the principle of *Jefferys v. Smith* (a), which I referred to in the other case, here also applies.

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It was said that the mortgagees might obtain the appointment of a receiver through the medium of the Justices of the Peace, but the power of making an application to the Justices does not exclude other remedies; and if these tenants in common cannot all agree, neither one, two, three, or a majority of them can bind the minority by such an appointment. They have no authority in the case exclusive of each other; nor is it pretended that they have any delegated authority from *Fripp*. I think it clear, therefore, that *Fripp* is in a position in which he may apply to the Court for a receiver; and the question therefore is, whether it is right to make the order which is asked; and to ascertain this, it becomes necessary to go through the evidence which has been brought before the Court on this application.

It appears in this case that the Plaintiff has a large interest at stake, to the extent of 10,000*l.*; but although this is so, the majority of the mortgagees, both in number and amount, are opposed to this application, and to the view

(a) J. & W. 298.

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taken by him. There are mortgagees, about twenty in number, who approve of the present system of management and of the present manager, and do not wish to see either changed. In this state of things, the Plaintiff being entitled to have a receiver as it appears to me, I have had to consider whether it would be the proper course to continue *Farquhar* in the management, he submitting to act under the authority of the Court, and account according to its directions. I was at first inclined to think that this might be a proper order to make, but I have come to the conclusion that it would not, and that some entirely indifferent person ought to be appointed. It was said that there was and is nothing to preclude the persons who appointed *Farquhar* from doing so; that may shortly be answered by observing that they shew no authority, as against *Fripp*, to make such an appointment. But even if they had such authority, the question would still be, whether, in the position in which *Farquhar* stands, it would be right that he should hold this particular office. He and Mr. *Cooke* are by far the most important customers of the canal. There must therefore be, so long as he occupies this double position, a considerable conflict between his interest and his duty. The Act of Parliament seems to have designed to guard against such a state of things, for it provides that no person holding any place of profit under, or having any contract with, the Company, shall be qualified for being a member of the committee of management(a); and again, it enacts that the wharfingers and servants of the Company, unduly giving preference, or shewing partiality to any person using the canal, shall be liable to a penalty(b). I do not impute to Mr. *Farquhar* anything improper, but it is evidently not desirable that a person who has to pay should be himself the gauger and measurer of the goods and traffic upon which he has to pay. There are, no doubt, many considerations to which it is necessary to advert—after all that has

(a) 4 W. 4, c. liii. s. 72.

(b) Id. s. 112.

occurred in this case. It is contended that the arrangement has in truth been a profitable one,—that in seven years no complaint has been made; that all the mortgagees except the Plaintiff, forming a considerable majority in number and amount, desire that Mr. *Farquhar* shall be continued in the management; that the Plaintiff himself must, under all the circumstances of the case, be taken to have acquiesced; and that in these proceedings the Plaintiff is supported, and in fact put forward, by the *Bristol and Exeter* Railway Company, the rivals of the canal in the carrying trade; and this last argument is supported by the facts, that eleven of the Plaintiff's affidavits are made by members of that railway company, and that the person whom he recommends as manager is also manager of the railway, which I must say seems a very strange selection.

As to that part of the case which relates to the removal of the present manager, I must say that it appears to me, that all that Mr. *Farquhar* did, in its inception, was done with a view to the benefit of the Canal Company; I think he was placed in an unfortunate position with regard to it; but unless, perhaps, it be as to the agreement concerning the tolls, which I shall mention presently, he appears to have acted for the benefit of the company. It is said that the canal was in a very difficult position; that, after a long correspondence with the *Taunton* traders, *Farquhar* was led to suggest the formation of the Coal Company. He then took measures, which certainly display great ability and earnestness, to promote the interests of the company; and ultimately the Coal Company was formed, and he bought up the only three remaining traders on the canal. This again aggravated the difficulty which he would have in holding an even hand between himself and the company in any advice which he might be called upon to give for their benefit; and it is certainly difficult for him, occupying such a position, to convince the Court that he is a proper person to be receiver.

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[His Honour then went through the evidence with reference to the position of Mr. *Farquhar*, and observed, that, in looking at what had taken place with reference to the question whether he would be a proper person to be appointed the receiver under the authority of the Court, when the transaction of 1845 came to be considered, it appeared that the other mortgagees had placed themselves entirely in the hands of *Cooke* and *Farquhar*. Every step was taken at their suggestion, and when the Plaintiff attempted, by serving the company with a writ for 2,500*l.*, to pursue a remedy of his own, *Cooke* informed the Plaintiff that the company intended to confess judgment in respect of the debts due to their simple contract creditors, and judgment was accordingly confessed and execution entered up, and *Reynolds* placed in possession. When the consent of the other mortgagees was asked to sanction such possession, nineteen out of twenty of them sent in answers in a common form, as if proceeding from the same instigation. With regard to the arrangement which was sought to be carried into effect by a resolution of the company, that all persons who should undertake to carry 12,000 tons of coal on the canal in the year should be charged 1½*d.* per ton per mile, and other persons 2*d.* per ton,—it was apparently founded upon the report of *Farquhar* to the sub-committee in August, 1845, that certain other parties were interfering with the trade,—but, in the circumstances stated, it was not apparent that the interests of the company, or of any other person than Mr. *Farquhar*, were prejudiced. If, indeed, he had meant to intimate to the committee his opinion that all competition was prejudicial,—that theory ought to have been more clearly propounded and its bearings considered. Instead of the resolution varying the amount of the toll for coals according as the quantity carried was above or below 12,000 tons, it would have been a more open course to have said at once that Mr. *Farquhar's* goods were to be carried at the lower, and those of every other person at the higher,

rate. It might be still a question, if any person wished to raise it, whether, if this variation of the scale of tolls was not announced upon the public tables of tolls, Mr. *Farquhar* did not remain liable for the greater toll of 2*d.* per ton per mile for all goods carried notwithstanding that arrangement. It might be questioned whether the resolution was binding until duly published by being painted on the toll boards. It was in explanation said that this was not done, because the resolution was only to have effect for one year. It did not, however, even appear that Mr. *Farquhar* had entered into articles binding himself to send 12,000 tons of goods for carriage in the year. In fact, it appeared that in the last year the Coal Company had not carried 12,000 tons of goods on the canal; for upwards of 2,000 tons, for which tolls were paid by the Coal Company, belonged to other parties, and would reduce the quantity of their own goods to less than 12,000 tons. The result of their thus carrying the goods of others was twofold. They had thereby raised their own nominal average to more than 12,000 tons, by which they were placed in the favoured position; and the company had been carrying these goods for other persons at 1½*d.* per ton per mile, which unquestionably ought to have paid 2*d.* His Honour then adverted to the different language which appeared to have been addressed by Mr. *Farquhar* on the subject of the tolls to the other traders in the neighbourhood and to persons connected with the company, and observed that no answer had been given to a paragraph in the affidavits for the Plaintiff, in which this part of the case had been put forward. It did not follow that there was anything immoral in these different ways of looking at the subject,—the arguments were perfectly fair in both cases; and it had been, indeed, admitted at the bar, that no man could avoid feeling an interest as a trader in such a case; but his Honour concluded, that he was not, therefore, the proper person to be appointed as the receiver and manager of the canal. On the argument as to

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the acquiescence of the Plaintiff in Mr. *Farquhar's* management, his Honour said, that although one might approve of a particular manager up to a certain time, he was, therefore, not bound to assent to his continuing in that situation if he ceased to think him a fit person. There was no evidence that the Plaintiff knew of the agreement as to the reduced toll, still less that he knew of the manner in which that agreement had been acted upon; and his Honour was of opinion that no case of acquiescence to bind the Plaintiff had been made out. With regard to the interest of the Plaintiff in the *Bristol and Exeter* Railway Company, whether he had or had not a favourable feeling towards that company, he had no doubt a substantial interest to the extent of 10,000*l.* in this canal. The Court might not have listened to a Plaintiff coming under suspicious circumstances, and interested in the company only to the extent of 300*l.* or 400*l.*; but the Plaintiff possessed clearly an independent interest of long standing, and he stated by his deposition that he had no direct interest in the railway company. The Court might think he took a view friendly to the railway and its managers, just as his co-mortgagees took a view friendly to the Coal Company and to *Farquhar* and *Cooke*, but this did not constitute ground on which the Court would refuse to give the Plaintiff the benefit of having an independent person as manager.]

It only remains to consider what should be the form of the order. This is only an interlocutory application. I do not say what view I shall take at the hearing. The Plaintiff may be advised to alter the constitution of the suit. I am bound, I think, if the parties cannot agree, to appoint a receiver on behalf of all parties. I observe an account is required, and that *Reynolds* shall pay into Court the amounts received by him. It may be a question whether he alone is a sufficient party, or whether other mortgagees may not be required to be added to the suit; but at present

I think there is nothing to prevent me from interfering to preserve the subject-matter of the suit. I shall therefore order, first, that some proper person be appointed receiver of the tolls, rates, and duties, and all the rents and profits of any real estate vested in the company, with power to appoint agents to collect the same. I have not introduced the word "manage," that will be considered at the hearing. Secondly: the books must be delivered over to the receiver. Thirdly: directions must be given as to the application of the monies so received; first, in maintaining the canal and payment of salaries of the collectors appointed by the receiver, and of the other officers of the Canal Company, and then payment must be made of the interest on the mortgages, all such payments being allowed in the accounts. The order must be without prejudice to the rights of prior incumbrancers, or to the right (if any) of the company or the committee of management, under the Act of Parliament, with respect to controlling the trade of the canal. I wish to make an order not interfering too far with the management at present, but not saying that at the hearing I may not go further; but I also wish not to trench on the doctrine in the case of *Russel v. The East Anglian Railway Company*. It is better, moreover, to disturb the arrangement of the business as little as possible. The matter will be adjourned to chambers for the appointment of the receiver.

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POLLOCK v. LESTER.

Injunction granted before a trial at law, to restrain the burning of bricks, not then already burning in clamp, on ground within sixty yards from the plaintiff's houses, and from continuing after a certain day to burn such as were then burning,—upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the operation,—the plaintiffs undertaking to proceed with the action at the assizes about to take place, and to abide any order the Court might make as to damages to the defendant.

A MOTION for an injunction to restrain the Defendant, his servants, workmen, and agents, from burning or causing to be burnt any bricks on a certain piece of vacant ground belonging to him at *North End, Fulham*, so as to occasion damage or annoyance to the Plaintiffs, *Pollock, Pain*, and *A. R. & A. J. Sutherland*, or any of them, as owners or occupiers, or owner or occupier of their respective dwelling houses, gardens, and pleasure grounds, or any of them, or injury or damage to the same dwelling houses, gardens, and pleasure grounds, or any of them.

The Plaintiff *Pollock* was the lessee, under a lease for twenty-one years, of a house and pleasure grounds which he had occupied for four years and a half, and on the improvement of which he had expended a considerable sum of money.

The Plaintiff *Pain* was a tenant from year to year of a dwelling house and pleasure grounds adjoining the premises of *Pollock*, which he had occupied for upwards of seven years.

The Plaintiffs, the *Sutherlands*, were doctors of medicine, and were the owners of a copyhold house, garden, and pleasure grounds abutting on the same premises, and which they had for many years used and occupied as an establishment for the reception of lunatic patients.

The Defendant, being the proprietor of about an acre of ground opposite to the Plaintiffs' premises, and only separated therefrom by the high road, on which acre of ground,

until 1852, stood a dwelling house called *Grove Cottage*, in the middle of that year pulled down such house, cut down the trees, and grubbed up the shrubs; and in May, 1853, caused to be dug up, on the ground thus made vacant, considerable quantities of earth for the purpose of making or burning bricks; and he subsequently caused a great quantity of bricks to be made of the earth so dug up, and he was preparing to burn the bricks, and had begun to form a clamp of bricks in a corner of the same ground, and placed there a considerable quantity of breeze and large ashes, and burnt bricks, to be used in such clamp for the purpose of firing and burning the same; when, after notice given to the Defendant to abstain, the bill was filed, and the application for the injunction made.

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The bill and affidavits stated that the clamp of bricks so begun to be formed was not more than sixty yards from the respective houses of *Pollock* and *Pain*, and not more than seventy-five yards from the grounds of the Drs. *Sutherland*; that *Pollock* had been for several months in bad health and was only now convalescent, and that it was absolutely necessary for his health that the air he breathed should be as pure as possible; and that there were twenty-eight patients in the Drs. *Sutherlands'* establishment, to whose recovery pure air and exercise in the gardens and pleasure grounds attached to the house was essential.

The bill and affidavits alleged that the burning of bricks on the said piece of ground would be a very great annoyance to the Plaintiffs and to all the persons inhabiting their houses, and that great injury would accrue to the Plaintiffs and to their dwelling houses, trees, shrubs, and plants; that the process of burning the bricks in the manner intended by the Defendant, which was the ordinary mode of burning bricks, would give rise to a dense smoke, and acrid vapours, and blacks, and other floating substances, which

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would mix with and deteriorate the surrounding atmosphere; that *Pollock* would be compelled to quit his dwelling house; and in all probability many of the lunatic patients would be compelled to quit the *Drs. Sutherlands'* establishment, the recovery of those who remained would be retarded, and the business and reputation of the establishment would be injuriously affected.

Mr. *Rolt* and Mr. *Jessel*, for the Plaintiffs, applied *ex parte* for the injunction.

The VICE-CHANCELLOR, after hearing the affidavits, said that the case was left exceedingly bare, and appeared to be founded entirely on conjecture. One case had decided that burning bricks within forty-eight yards of a dwelling house was a nuisance, but the distance in this case was considerably more; and there was no affidavit stating that any actual damage had been or must necessarily be suffered. The motion might stand over until the next seal, with liberty to file further affidavits.

Affidavits were subsequently filed, to the effect that the Plaintiff *Pollock* and his wife had both suffered in their health from the noxious air which had been emitted from the burning bricks, and that the latter especially had been affected with nausea from that cause; and that they had been obliged to close and keep closed the doors and windows of their house, in order to exclude the corrupted air; and that the Plaintiff *Pain* had also found like pain and inconvenience from the same cause; but there was no evidence of anybody having suffered in the establishment of the *Drs. Sutherland*.

On behalf of the Defendant, affidavits were made by several persons residing in the immediate neighbourhood of the clamp of bricks which was in process of burning, and nearer thereto than the residences of the Plaintiffs, and the deponents stated that they felt no inconvenience from the operation. It was, moreover, stated by affidavit that the Defendant had obviated all danger of injury to health by using only pure earth, which had no noxious or deleterious qualities, and by avoiding altogether the use of chalk, from which sulphur would have been evolved.

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Mr. *Rolt* and Mr. *Jessel* again moved for the injunction, and relied chiefly on the authority of the case of *Walter v. Selfe*(a), in which the Vice-Chancellor *Knight Bruce*, after observing that it was certain that the process of manufacturing bricks there referred to must communicate smoke, vapour, and floating substances of some kind to the air, and thus occasion inconvenience to the occupier of the neighbouring house, proceeded to say:—"The important point next in decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people? And I am of opinion that this point is against the Defendant. As far as the human frame, in an average state of health at least, is concerned, mere insalubrity, mere unwholesomeness, may possibly be out of the case; but the same may perhaps be asserted of melted tal-

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(a) March 24th and 25th and April 16th, 1851, reported 15 Jurist, 416.

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low and other such inventions less sweet than wholesome. . . .
That does not decide the dispute. Smell may be sickening . . . ,
though not in a medical sense. Ingredients may be, I be-
lieve, mixed with air, of such a nature as to affect the palate . . . ;
disagreeably and offensively, though not unwholesomely . . . ;
a man's body may be in a state of chronic discomfort, still . . . will
retaining its health, and perhaps suffer more annoyance . . .
from impure or foetid air, from being in a hale condition . . .
Nor do I conceive it essential to shew that vegetable life . . .
or that health, either universally or in particular instances . . .
is seriously affected by contact with vapour and floating . . .
substances proceeding from burning bricks; for the Plaintiffs
have, I think, established that the Defendant's intended
proceedings will, if prosecuted, abridge and diminish . . .
seriously and materially, the ordinary comfort and existence
to the occupiers and inmates of the Plaintiffs' houses, what-
ever their rank or station, or whatever their state of health
may be" (a).

On behalf of the Plaintiffs it was submitted, that the
evidence brought the case within all the reasoning of the
learned Judge contained in the above extract. The case of
Barwell v. Brooks, before the Vice-Chancellor of England,
8th Aug., 1843 (b), was also cited.

Mr. Glasse and Mr. Greene for the Defendant.—First
the question whether a person may not lawfully use the
soil of his own land, upon that land, for the purpose of form-
ing it into bricks by calcination, is purely a legal question.
If equity deals with it in any case, it is merely for the
auxiliary purpose of protecting a legal right. Now there
is no decision of a court of law that such a conversion of
the soil, in the neighbourhood of human habitations, is such
a nuisance as the inhabitants of those dwellings may pre-

(a) 15 Jurist, 419.

(b) See 15 Jurist, 419, n.

vent. Admitting that it cannot fail to be generally disagreeable to those who live close at hand, yet it is a matter of prime necessity that the earth shall be prepared for the abodes of man. His concurrence makes this more frequently necessary in the proximity of large cities; and to hold that all the surface of the earth capable of being converted into such materials is to be taken from its natural position and carried to some remote place to be burnt, and then brought back again to the spot on which it was found and where it is to be used, would be intolerable. It might be of little consequence to the wealthy and fastidious, and it might be rather gratifying to them to discover a legal principle, upon which not only may they remove to a distance an operation which may be temporarily disagreeable, but also impose a great impediment to the increase of houses around them. Everything however which is calculated to make the construction of sufficient habitations extremely difficult and costly is a serious evil, in increasing the inevitable charges of the classes who are not wealthy, and is also a great obstruction to industry. If the motives which lead to these applications could be detected, it would be, perhaps, found that the ulterior object of preventing the increase of buildings around their own dwellings had a greater influence on the applicants than the comparatively brief inconvenience occasioned by these kinds of work. The distinction upon which the Defendant relies, is that which exists between a permanent and a temporary operation. It is not denied, that, if the Defendant brought clay from another place to burn it upon land near the Plaintiffs' houses, it might be a nuisance. It would not be a course justified by reasonable necessity; for, if he removed the material to a spot distant from that at which it is found, he may well be required to carry it so far as to obviate all offence; if he did not do so, it would be like the case of setting up a noxious trade in the midst of a town or

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parish, *Rex v. White*(a), which is clearly a nuisance: but the use of the soil of the land itself, for hardening it, so that it may be fitted for the construction of the houses to be built thereon, and by the completion of which the operation will be necessarily terminated, it is consistent with no principle of law or policy to prevent. As well might a person seek to prevent his neighbour from pulling down, rebuilding, or improving his house. The noise, the dust and dirt, the injury to furniture, and many other inconveniencies, might in that case be alleged; but if they were allowed as valid objections, no improvements or re-constructions could be made. The right to do the particular work, without interruption, flows from the reasonable necessity of the act, coupled with the certainly limited time which is required for its complete performance. It is thus held, that, "in *London* or other places, the unloading of billets in the high street before my house for my use, is not any nuisance for the necessity; but if he suffers them to continue there for a long time after the unloading, it is a nuisance punishable"(b). This simple case affords a perfect analogy to that now before the Court. No doubt, by an unbounded expenditure of time or labour, every billet of wood might be brought from the same distant yard separately as it was needed, so as to create no inconvenience to others, or, by collecting a very large number of labourers, the load might be discharged in a very short time; and so with regard to converting the soil into bricks, by an unbounded expenditure of time or labour, the whole of the convertible clay might be conveyed to some open and uninhabited space and burnt, and then carried back again to the spot from which it was taken; but the law does not impose upon individuals or upon society so burdensome a task. The authorities, so far as they exist, affirm the distinction between an inconvenience arising from a

(a) 1 Burr. 333.

(b) 16 Vin. Ab. tit. Nuisance, B. pl. 2, 3.

merely temporary and necessary use of property, and that which is occasioned by a use which is or may be in its nature permanent. This is the tenor of the observations of Lord Eldon, in the *Attorney-General v. Cleaver* (a), where adverting to the *Duke of Grafton v. Hilliard* (b), he says: "The note I have gives me no information upon the doctrine as to public nuisance; amounting to no more than this, that the Court refused the injunction, observing that the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance" (c). These few words contain the whole distinction upon which the Defendant rests; they express the reasonable necessity of so preparing the materials for building, and the certainty that whatever inconvenience may be thereby caused, must cease when the houses are built. The order of Lord Hardwicke, refusing the injunction in that case, as extracted from the Registrar's book (d), plainly shews that the Court proceeded on the ground that the bricks were necessarily to be burnt, and that the operation would endure but a short time; and as the Court, therefore, would not yield to an application, by which, in that day, the inhabitants of *Bond-street* and *Dover-street* sought to impede the works by which *May-fair* was then about to be covered with mansions, neither should it now, when the metropolis has been extended to *Fulham*, be induced, by arguments founded on a like transitory inconvenience, to interfere in a manner which will obstruct the progress of similar improvements. The decision of the Vice-Chancellor *Knight Bruce*, in *Walter v. Selfe*, was made after a view of the place, and, as the learned judge observes of the case of the *Duke of Grafton v. Hilliard*, and as all such cases must be, on its special cir-

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(a) 18 Ves. 211.

(c) 18 Ves. 219.

(b) Amb. (Blunt's ed.) 160, n. 2.

(d) See 15 Jur. 417, n.

See 15 Jur. 417, n.

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cumstances. There was nothing to shew that the Defendant in *Walter v. Selfe* did not intend to establish a permanent brick manufactory.

Secondly.—The Court will not interfere until the Plaintiffs have established their right at law, in a matter in which the whole question of nuisance or no nuisance, having regard to time, place, and circumstance, if a question at all, is a question for a jury: *Elmhurst v. Spencer* (a), *White v. Cohen* (b).

Thirdly.—The Plaintiffs have not a common interest, and it is clearly a case of misjoinder. Only two of the Plaintiffs have, upon the evidence, suffered any degree of inconvenience; and it is not a case in which the 49th section of the Act, 15 & 16 Vict. c. 86, has any application; for it is not a case in which it would be proper to make either of the Plaintiffs a Defendant, which that section contemplates: *Hudson v. Maddison* (c), *Cowley v. Cowley* (d).

June 30th.

Judgment.

The VICE-CHANCELLOR said:—That although there might be some inconvenience in the state of the record where one or more of several Plaintiffs, having several rights, failed in establishing the claim asserted by the bill, and others succeeded, yet the Court was, by the Act 15 & 16 Vict. c. 86, s. 49, enabled to modify its decree, according to the circumstances of the case, without refusing relief to those who should prove to be entitled to it.

With regard to the question whether the injunction should be granted before any trial at law had taken place, it was a question of the amount of comparative inconvenience. Every

(a) 2 M'N. & G. 45.

(b) 1 Dru. 312.

(c) 12 Sim. 416.

(d) 9 Sim. 299.

case of alleged nuisance necessarily raised a mixed question of law and fact. Every trade and occupation, called into existence to supply the wants of civilised life, whether in the construction of dwellings or otherwise, must be lawfully carried on somewhere; and therefore, irrespective of the circumstances by which it was surrounded, it could not be pronounced a nuisance. The Plaintiffs, to succeed in a court of law, must prove first *damnum* and then *injuria*. The observation of Lord *Eldon* as to the case of the *Duke of Grafton v. Hilliard*, would seem to imply that he thought it doubtful whether brick burning, even carried on near dwellings, was legally a nuisance. That it is a nuisance under some circumstances was established by the decision of the Vice-Chancellor *Knight Bruce* in the case of *Walter v. Selfe*, and in this case there was positive evidence, on the affidavits, of the injurious effects which the operation complained of had produced on the state of health of two of the Plaintiffs and members of their families; and the fact might also be adverted to, that the Plaintiffs had been in the complete enjoyment of their houses, without any brick burning in the neighbourhood, until these operations had been commenced.

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The order was made to restrain the Defendant from burning any bricks on the piece of ground on the pleadings mentioned, other than those which were actually burning in a clamp, and not to continue such burning beyond a week from this day; the Plaintiffs or one of them, undertaking to proceed with their action at the present assizes for the county of *Surrey*, and to abide such order as the Court might make for payment of any damages which should arise to the Defendant in consequence of the order.

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June 8th,
11th, & 25th.

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A SPECIAL CASE.—By a settlement on the marriage of the Plaintiff *Maria Ewart* with *Peter Ewart*, since deceased, dated the 2nd of May, 1831, two sums of money, 5292*l.* and 1978*l.*, to which the Plaintiff was entitled in reversion expectant on the death of her mother, and a sum of 1723*l.*, to which she was entitled absolutely, “and all other the monies, stocks, funds, securities for money, and personal estate whatsoever to which the Plaintiff was then, or to which she, or her said intended husband in her right, might at any time or times thereafter, during the said intended coverture, be or become entitled, whether in possession, reversion, remainder, or expectancy;” and all the right, title, and interest of the Plaintiff therein or thereto respectively, with all benefit and advantage thereof and all securities for the same, were assigned by the Plaintiff, with the consent and approbation of the said *Peter Ewart*, unto trustees, their executors, administrators, and assigns, upon given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of 1000*l.*, and an annuity of 100*l.* for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation.

Held, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement, and that property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement.

That the appointment by the wife was a valid exercise of the power contained in her father's will.

That upon the appointment by the wife of the 1000*l.* for her own absolute use, that sum became bound by the trusts of the settlement; and the power of revocation was ineffectual.

That the interest in the annuity of 100*l.* for her own life for her separate use, which the wife took under her appointment (an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired), was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted, or taken otherwise than in the state in which it should be so acquired.

trust (with other property assigned by the Plaintiff's father) for the benefit of the respective settlors until the marriage, and then upon trust for the Plaintiff for her life, for her separate use, without power of anticipation, and after her decease upon trust for *Peter Ewart*, the husband, for his life, with remainder to the child, or (if more than one) the children of the marriage equally as tenants in common, with a provision that in case any child, being a son, should die under twenty-one, or, being a daughter, under that age or before her marriage, the share or shares of the children so dying should be equally divided amongst the other or others; and in case no child of the marriage should attain twenty-one, or, being a daughter, should marry before that age, then, in case the Plaintiff should survive the said *Peter Ewart*, the husband, upon trust for the Plaintiff, her executors, administrators, and assigns, for her and their own use and benefit.

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The marriage took place, and there was issue five children, all of whom were infants, and were made Defendants in this case.

Nicholas Salisbury, the Plaintiff's father, by his will, dated the 1st of June, 1842, bequeathed his real and residuary personal estate to trustees, upon trust to sell the real and get in the personal estate, and to pay the interest and annual produce of the whole of the said estate to his wife (the Plaintiff's mother) for her life; and after her decease he directed that his trustees should stand possessed of the whole of the said trust monies and estate, and the interest, dividends, and annual produce thereof, for such person or persons, in such parts, shares, and proportions, and subject to such conditions and limitations, and in such manner and form in all respects as the Plaintiff, his daughter, notwithstanding her then present or any future coverture, by any deed or deeds, with or without power of revocation and new

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appointment, or by her last will and testament, should direct, limit, or appoint; and in default of such appointment, and so far as any such, if made, should not extend, upon trust for such child or children of the Plaintiff as should be living at her decease, and for such issue then living of any child or children of the Plaintiff who might have died in her lifetime leaving issue, such children to take as therein mentioned.

The testator *Nicholas Salisbury* died in April, 1843, leaving no real estate, but leaving residuary personal estate of the value of about 40,000*l.*, of which his widow received the income until her death.

By a deed poll, dated the 5th of July, 1844, the Plaintiff, in pursuance of the power and authority given to her by the said will of her father, and of every other authority vested in her, directed and appointed, that, as soon as might be after the decease of her mother, the sum of 1000*l.*, part of the monies to arise from the testator's estate, should be held by the trustees of his will, upon trust, to pay the same to her (the Plaintiff) for her separate use; and as to the rest of the testator's residuary estate, she directed and appointed that the same should, after the decease of her mother, be paid or transferred into the names of two trustees therein mentioned, upon trust, as to the annual produce of such trust monies, to pay the annual sum of 100*l.* to the Plaintiff, for her separate use, by equal half-yearly payments, as therein mentioned; and as to the remainder of such annual produce, upon trust, during the life of the Plaintiff, from time to time to pay the same to the Plaintiff, for her separate use, but so that she should not dispose thereof by way of anticipation. And the Plaintiff thereby further directed and appointed, that, from and after the death of her mother and herself, the said trustees should (except as to the 1000*l.* appointed as aforesaid) stand possessed of the

said trust monies, upon trust, to raise and appropriate 4000*l.* a-piece for her three daughters, *Maria*, *Ann*, and *Emily*, for their separate use respectively, with survivorship amongst them in case of the death of any of them under the age of twenty-one and unmarried ; and should stand possessed of the remainder of such trust monies upon trust for her two sons, *William* and *Henry*, to be vested interests in them at the age of twenty-one, with benefit of survivorship between them, as therein mentioned. And the Plaintiff thereby declared that it should be lawful for her (the Plaintiff) by deed or deeds, with or without power of revocation, or by her will, to revoke, determine, and make void all and every of the directions, appointments, and declarations thereinbefore contained, and also to execute her power of appointment under her father's will, by such or any other deed or deeds or by such her last will.

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The widow of the testator and mother of the Plaintiff died in May, 1850, having by her will bequeathed her personal estate upon trusts exactly similar to those expressed in the will of the testator, her husband ; and the testatrix thereby expressly declared and directed, that the general power of appointment thereinbefore given by her said will to the Plaintiff should and might be exercised by her, altogether independent and irrespective of the settlement of May, 1831, made previous to her marriage, and of the trusts thereof ; and she thereby expressly excluded all and singular the trust funds thereby bequeathed from being in any manner bound or affected by such settlement. The residuary personal estate of the testatrix amounted to about 1000*l.*

Peter Ewart, the Plaintiff's husband, died in August, 1852.

The case stated that the Plaintiff had not in any way

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exercised or purported to exercise the power given or intended to be given to her by her mother's will.

The opinion of the Court was asked on the following questions :—

1. Whether the power of appointment given to the Plaintiff by her father's will of his residuary estate was well executed by her, by the deed poll of 1844, or whether such power was controlled or affected by the settlement of 1831.

2. Whether, as the Plaintiff had during her coverture made a revocable appointment of 1000*l.*, part of her father's residuary estate, for her own absolute benefit, the trusts of the marriage settlement had fastened upon the said 1000*l.*

3. Whether any interest which the Plaintiff might thereafter acquire by the exercise of either of the powers of appointment under the wills of her father or mother, would fall under the influence of the marriage settlement.

4. Whether the Plaintiff might under the said will of her mother appoint her residuary estate at her own discretion, without regard to the trusts of the marriage settlement, or whether her power was to any and what extent controlled or affected by such settlement.

Argument.

Mr. Toller, for the Plaintiff, argued that her power over the property in which she took an interest under her father's or her mother's will was not affected by the settlement. The settlement was with a different object. The object of the settlement was simply to exclude the marital right over an after-acquired property of the wife. The future property assigned by the settlement was that which might thereafter vest in her, or in her husband in her right. This description in substance disposed of the question, for the property subject to the appointment under the respective wills not vest in her, or in her husband in her right. The object of excluding the husband had been more commonly effe

by a covenant to settle after-acquired property ; but it could not reasonably be construed to have been the intention that the settlement, instead of securing the property to the separate use of the wife, should take it out of her power.

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Mr. *Woodhouse*, for the sons of the Plaintiff, cited *Platt v. Routh (a)* in support of the argument founded on the distinction between that which constitutes property and that which amounts to a power of disposition only. He contended, that the 100*l.* a year appointed by the Plaintiff to herself, for her separate use, by the deed poll of 1844, had become affected by the trusts of the settlement, and that the annuity should be sold and realised for the benefit of all the objects of that settlement.

Mr. *Hobhouse*, for the daughters of the Plaintiff, cited *Attorney-General v. Staff (b)*, which he contended was not, for the purpose of the argument in this case, affected by *Platt v. Routh*. It was a fallacy to say that the only object of the settlement was to protect the Plaintiff against the marital right, the object in all such cases is not less to guard the wife against the marital influence : *Holmes v. Coghill (c)*, *Butcher v. Butcher (d)*.

Mr. *Lee* (am. cur.) referred to the case of *Thornton v. Bright (e)*.

The VICE-CHANCELLOR,—After stating the form of the several instruments, and observing that no appointment had been made, or attempted to be made, under the mother's will, and the question to be considered therefore arose solely under the father's will,—proceeded :

Judgment.

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|---------------------------------------|---------------------------------|
| (a) 3 Beav. 257 ; S. P. <i>Drake</i> | (c) 7 Ves. 499 ; S. C., 12 Ves. |
| v. <i>Attorney-General</i> , 10 Cl. & | 206. |
| Fin. 257. | (d) 14 Beav. 222. |
| (b) 2 Cr. & M. 124. | (e) 2 Myl. & Cr. 230. |

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The first thing which strikes me is, that parties who take, subject to being displaced by an appointment, cannot be displaced unless the power of appointment be exercised. It was not argued by Mr. *Hobhouse* that the assignments in the marriage settlement could operate without any act on the part of the donee of the power, nor was it argued so high as that the language of the settlement amounted to a covenant on the part of the plaintiff to execute a power which might subsequently be vested in her, so that she could now be compelled so to execute the power in question, and thereby to bring the property over which it extends expressly within the scope of the settlement. Mr. *Hobhouse* entered into an ingenious argument to shew that in many cases an absolute power is treated as equivalent to an estate, and that in dealing with property subject to such power, any distinction is disregarded. No doubt that is so in some cases,—*Bray v. Hammersley*(a), *Phipson v. Turner*(b), and the case to which Mr. *Lee* referred me, *Thornton v. Bright* (c).

In the first of these cases there was a limitation to children, in such shares and subject to such conditions as the mother should appoint, and subject thereto to the children equally, and in case there should be only one child, then in trust for such child. There was only one child,—a daughter,—and the donee of the power appointed to that daughter for life, with remainder to such persons as the daughter should appoint, with remainder in default of appointment to the executors and administrators of the daughter; and on a bill by the husband of the daughter, claiming as her representative, and insisting that the power of appointment thus given to the daughter (who had exercised it by appointing the fund away from her husband) was bad, it was held that the limitation of such a power of appointment was a good exercise of

(a) 3 Sim. 513; S. C., *Bray v. Bree*, 2 Cl. & Fin. 453.

(b) 9 Sim. 227.

(c) 2 Myl. & Cr. 230.

the original power. That therefore was a case as strong as well could be to shew that a power and property under certain circumstances are subject to the same considerations. But it must not, therefore, be supposed that these authorities have broken down the distinctions between the two things, between the interest which a person possesses in a thing as property, and that which he may acquire in the same thing by the exercise of a power. This distinction is still strong in many points. In the first place, as I have before observed, the interests of those who take subject to a power cannot be displaced except by an actual exercise of the power. Again, in order to the effectual exercise of the power, there must be evidence of the intention to exercise it; and thus, a general assignment of all a man's estate and interest will not pass property over which he has a general power of appointment, unless the intention be shewn by the extraneous circumstance that he has no other property upon which the instrument could be intended to operate except that which is subject to the power. The real matter then to be considered in this case is, what is the contract and engagement between the parties,—what is the purport and object of the settlement? The settlement recites that it was agreed that all the property to which she was then entitled, or which might come to her or her husband in her right during the coverture, was to be assigned. With regard to her then existing property, as she had property at the time both in possession and in remainder, the assignment would only pass that,—her actual property,—as contradistinguished from that which she might at that time acquire by the execution of a power. Can I attribute a different object and meaning to the settlement with reference to words which point to future property? She says, that all the property which she has she assigns, and there is no question as to what is comprehended in that assignment. She then says, that all the property which she herself or her husband in her right shall acquire during the

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coverture shall pass by the assignment. This also can only refer to property which may come into possession as contradistinguished from that over which she may only have a power. If the settlement has any further effect at all it must be as a covenant to execute any power which she may have in a particular way; in which case a point would arise under her mother's will also, and the Court would be called upon to oblige her to execute the power, and thereby pass the property to the trusts of the settlement.

The case of *Holmes v. Coghill* (a) and the other authorities of that class go to this,—that, where a person has a general power of appointment, the subject of the power being liable to his debts, and he executes the power in favour of volunteers, the Court draws out from the volunteers so much as is necessary for satisfying the debts. That class of cases is founded on the peculiar consideration of what is due to creditors, and is an effort of the Court to prevent creditors from being defeated by their debtors. This is the principle in *Lord Townsend v. Windham* (b). Lord *Hardwicke* in that case felt considerable difficulty as to the way in which the Court had arrived at the conclusion to which it had come with respect to the effect of the appointment of personal estate. He reasons upon the operation of the statute of 15th Eliz., and refers to the judgment of Lord *Talbot* in *Shirley v. Lord Ferrers* (c), which has been often cited on the point, and where a voluntary appointment to a child was held to render the fund applicable to debts. This, he says, was followed by *Lascelles v. Lord Cornwallis* (d); but there is certainly a great step between the two cases. In the latter case, Lord *Cornwallis*, having a power to charge an estate with 3,000*l.*, appointed that sum to Sir *Stephen Fox*, a *sa* security for the quiet enjoy-

(a) 12 Ves. 286.

(b) 2 Ves. 1, 8, 9.

(c) See 7 Ves. 503, n. (b).

(d) 2 Vern. 465.

ment of lands which he had sold to him, making the appointment void if no incumbrance should arise. No necessity arose for resorting to this security, and by his will Lord *Cornwallis* gave the sum to his daughter. He did nothing more; but the Court held that he had executed his power, and that when the indemnity was answered there was a resulting trust for the appointor, which creditors could lay hold of. Lord *Hardwicke* says, that was done by a stretch of the power of the Court, and to prevent creditors from being defeated. But here there is no such principle. There is no creditor applying, and, therefore, those cases do not apply.

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In the present case, the whole object of the settlement seems to be this—It passes all that “she or her husband in her right” takes during the coverture. This mode of expression points to some distinction intended by the parties, and the words will be satisfied by my holding that they extend to all property which comes to the wife during the coverture for her separate use, as well as what might come to her generally. The plain intention of the settlement, I think, is, that, while she should be under marital influence, she should be shielded from that influence. But further than that she has not contracted nor agreed to exercise in any particular way any power which she might be able to exercise. I would rest the case upon that, and I think she was at liberty entirely to exercise it as she thought fit. On the first question, therefore, I must hold this power to have been well and effectually exercised.

With respect to the point taken by Mr. *Woodhouse*,—that the interest appointed by the Plaintiff to herself by way of annuity should be got in and settled for the benefit of all the objects of the settlement,—it appears to me that the Plaintiff was entitled to execute the power in the form

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in which this appointment is made. The meaning of the settlement must have been, that any property which might pass by it should so pass in the state in which the Plaintiff should acquire it, and not that upon being acquired it should be converted. Upon this point the case of *Thorn-ton v. Bright* (a) applies. Lord *Cottenham* there, although he relied upon the fact of its being the husband's covenant alone, and here it is the wife who is binding herself, yet relied also upon the circumstance that the intent and object of the whole covenant was not to apply to property as to which any express order or direction was given inconsistent with the purposes of the settlement.

There is next the question as to the 1000*l.* appointed by the same deed. I think that this is bound by the trusts of the marriage settlement. I am told that the 1000*l.* is only appointed by a revocable instrument; but it is not very easy to see what a power of revocation in such a case means, when it is to be applied to the payment of a sum of money actually payable, and which I must assume to be by this time actually paid. Suppose a sum of money in such a case to come to the hands of the party entitled to it under the appointment, and that he spends it: how could the question be entertained, whether it was to be subject to a power of revocation? The money, as soon as it came to the Plaintiff's hands, is bound by the settlement, so that she cannot then revoke her appointment of it. The point as to the suggested revocation does not, in fact, arise. It comes too late. She has, indeed, formally reserved to herself the power of revocation, but she has done an act by which she has deprived herself of that power as to this sum of 1000*l.* at least. Suppose, again, that at the date of the settlement she had been entitled to the reversion of this sum by an appointment subject to the power of revocation in herself,—her assignment contained in the settlement would

(a) 2 Myl. & Cr. 231.

have prevented her from exercising that power, for she could not then do anything in derogation of her own act.

The other questions presented to the Court upon the special case are speculative points, applying to facts which have not arisen, and on which the Court is not, therefore, bound to express any opinion.

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Judgment.

WYNDHAM v. FANE.

29th June.

THE following facts were stated upon a special case :—

Edmund Lambert, by his will, dated in March, 1802, bequeathed his residuary personal estate upon trust for his

A bequest of residuary personal estate to the testator's wife, daughter, and son-in-law

(the husband of the daughter), successively for life, and, after the death of the survivor, in trust for all the children of the daughter who should live to attain twenty-one or marry, other than and except the eldest and second sons, if any, and any other child who should, by virtue of the limitations contained in the said will, be entitled in possession to the said testator's estates thereafter mentioned, or the rents and profits thereof. The estates referred to were by the said will appointed (subject to prior and existing limitations) to the use of the daughter for her life, with remainder to the use of her husband (the said son-in-law) for his life, with remainder to the use of the second and all and every other son and sons, other than and except an eldest son of his said daughter, successively in tail male, with remainder to the use of the first and all and every other the daughter and daughters of his said daughter successively in tail male, with remainders over. The testator's daughter left two sons and several daughters. The second son of the testator's daughter died an infant unmarried, in the lifetime of his father (the testator's son-in-law), and thereupon the eldest daughter of the testator's daughter became entitled in the said estates, under the appointment contained in the will, to an estate tail male in remainder expectant on the termination of the preceding estates (of which the life estate of her father was one) then subsisting. By a settlement made upon the marriage of the eldest daughter, and by a recovery, she, her father, her husband, and the other parties then interested in the estates, concurred in declaring new uses thereof, whereby they were limited to such uses as the father, together with a previous tenant for life, and the daughter and her husband, should jointly appoint, and subject thereto, and to the confirmation of life estates and certain existing powers and terms of years, created by the anterior settlements, so far as they were subsisting, to the use of trustees for a term of ninety-nine years, upon trust to pay the rents and profits to the said eldest daughter, for her separate use, and subject thereto, to the use of the husband and his assigns, with remainders over. The eldest daughter died in the lifetime of her father, and therefore during the continuance of his life estate, and without having herself come into possession of the settled estates, or become entitled to receive the rents and profits thereof.

Held, that, upon the death of the father, the husband of the eldest daughter, as her personal representative, became entitled to an equal share of the residuary personal estate of the testator, as one of the children of his daughter, notwithstanding he (the husband of the eldest daughter) became also, under the recovery and marriage settlement, entitled in possession to a life interest in the said settled estates.

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widow, his daughter *Lucy*, and his son-in-law *John Bennett*, successively, for their respective lives; and after the death of the survivor of them, in trust for all and every the child and children of the body of his said daughter *Lucy Bennett*, begotten or to be begotten, that should live to attain to the age of twenty-one years, or day or days of marriage, whichever should first happen, other than and except the eldest and second sons, if any, and any other child who should by virtue of the limitations thereafter contained be entitled in possession to his (the testator's) manors and hereditaments thereafter mentioned, or to the rents, issues, and profits thereof, equally to be divided between them (if more than one), share and share alike, as tenants in common. And if there should be but one such child (other than and except as aforesaid) then in trust for such only child, on his or her attaining the said age of twenty-one years, or day of marriage before, whichever should first happen, to and for his or her own absolute use and benefit; and in the meantime (after the decease of his said wife and daughter and the said *John Bennett*) and until such child or children should have attained his, her, or their age or respective ages of twenty-one years, or day or days of marriage as aforesaid, whichever should first happen, in trust to pay and apply the interest, dividends, and profits thereof for or towards the maintenance, education, or other use and benefit of such child and children. And the testator, after reciting in his said will that in and by an indenture of settlement, dated in December, 1782, made between the parties therein named, certain manors, hereditaments, and premises therein described were, in default of issue of his son *Aylmer Bourke Lambert* (an event which afterwards happened), and other preceding uses (which afterwards determined) limited in use as the said testator should by deed or will appoint,—the testator thereby appointed the said manors, hereditaments, and premises to the use of his said daughter *Lucy Bennett* during her life, with remainder to

the use of the said *John Benett*, the husband of the said *Lucy Benett*, for life, with remainder to the use of trustees to support contingent remainders, with remainder to the use of the second and all and every other son and sons of his said daughter *Lucy*, begotten or to be begotten (other than and except the eldest son), successively in tail male, with remainder to the use of the first and all and every other the daughter and daughters of his said daughter *Lucy Benett*, successively in tail male, with remainder to the use of the first son of his said daughter *Lucy Benett*, begotten or to be begotten, in tail male, with divers remainders over. And the will contained a clause requiring the issue, male and female respectively, of his daughter *Lucy*, and the husbands of such issue female in case of their marriage, and their heirs male respectively, as and when they should severally and respectively, by virtue of the limitations thereinbefore contained, become and be entitled in possession to the said hereditaments and premises, or to receive the rents and profits thereof, to take and use the name and arms of *Lambert* only.

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The testator died in 1802. *Lucy Benett* died in 1827, having had two sons and four daughters, namely, *John* (her eldest son, since deceased), *Thomas Edmund* (who died in 1829, an infant and unmarried), *Lucy Harriet* (the wife of the Defendant *Arthur Fane*, who was her eldest daughter, and attained twenty-one years of age in 1823), and three younger daughters, *Ethelred Catherine*, *Anna Maria*, and *Fanny*. *Lucy Harriet Fane* became entitled, under the said will, on the death of her brother *Thomas Edmund Benett* without issue, to an estate tail male in the said settled estates in remainder, expectant on the death without issue of the said *Aylmer Bourke Lambert*, and the death of *John Benett*, her father.

After the marriage of *Lucy Harriet* with *Arthur Fane*,

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but in pursuance of articles made before the marriage, by deeds of lease and release of the 8th and 9th of November, 1833, the latter made between *Aylmer Bourke Lambert*, of the first part, *John Benett* (the father), of the second part, *Arthur Fane* and *Lucy Harriet*, his wife, of the third part, and certain trustees and releasees and others, of the fourth, fifth, sixth, seventh, and eighth parts, and a common recovery suffered in pursuance of an agreement contained in the said release, and a declaration of the uses of such recovery contained in the same indenture, the manor and hereditaments comprised in the settlement of December, 1782, and appointed by the said will, and all other the manors and hereditaments in the county of *Wilts* whereof the said *Aylmer Bourke Lambert* was then tenant for life or entitled to the rents and profits during his life, and the said *Lucy Harriet Fane* was then tenant in tail in remainder, or which were in anywise subject to the powers or trusts of the said marriage articles, were limited to the use of such person or persons for such estate or estates, and subject to such conditions, as the said *Aylmer Bourke Lambert* and *John Benett* (the father), or the survivor of them, together with the said *Arthur Fane* and *Lucy Harriet*, his wife, during their joint lives, or, after the decease of either of them, then together with the survivor of them, should appoint, (but which power was never exercised), and in default of such appointment (subject to the confirmation of the life estate therein limited to the said *Aylmer Bourke Lambert* by the said settlement of December, 1782, and to the confirmation of certain terms of years and the trusts thereof created by the same indenture, and of the powers therein contained, so far as the same were then subsisting or capable of taking effect), to the use of trustees for a term of ninety-nine years, if the said *Arthur Fane* and *Harriet* his wife should both so long live, upon trust, to receive the rents and profits of the said manor and hereditaments, and pay the same to the said *Lucy Harriet Fane*,

for her separate use, without power of anticipation, and upon the expiration or sooner determination of the said term, to the use of the Defendant *Arthur Fane* and his assigns for his life, with divers remainders over.

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Lucy Harriet Fane died in 1845, in the lifetime of her father *John Benett*, without having herself come into possession of the settled estates or become entitled to receive the rents and profits thereof.

The widow of the testator died in 1836. *Aylmer Bourke Lambert* died in 1842, without issue; and thereupon *John Benett* the elder became tenant for life in possession of the settled estates. *John Benett* the elder died in 1852, and the Defendant *Arthur Fane* thereupon became tenant for life in possession of the settled estates by virtue of the uses thereof declared by the release of the 9th of November, 1833, and the said recovery.

The Defendant *Arthur Fane* took out letters of administration to the effects of his deceased wife *Lucy Harriet*, and claimed to be entitled to her share in the residuary personal estate of the testator *Edmund Lambert*, which residuary personal estate consisted of three sums of 3*l.* per cent. Consols, viz. 1465*l.* 4*s.*, 5967*l.* 14*s.* 6*d.*, and 503*l.* 18*s.* 9*d.*; and were upon the death of *John Benett* the elder (the last tenant for life under the will) divisible between the parties entitled thereto under the same will.

The opinion of the Court was asked on the question, whether, in the events which had happened, the said three sums of stock and the dividends which had accrued since the death of *John Benett* the elder, were divisible in equal fourth parts amongst the administrator of *Lucy Harriet Fane* the eldest daughter, and the three younger

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daughters or their respective representatives, or in equal third parts amongst the three younger daughters or their respective representatives, excluding the representative of *Lucy Harriet Fane*.

Argument.

Mr. *Messitor*, for the Plaintiffs, the trustees.

Mr. *Wigram*, Mr. *Baily*, and Mr. *Sidebottom*, for the younger daughters.

The question is, whether *Lucy Harriet Fane* became entitled in possession to the settled estates so as to come within the exclusive clause in the bequest of the personal estate. The husband of the lady, under her marriage settlement, and by means of the recovery, is now in the enjoyment of the estates, as derived from his wife. It is substantially her interest which he possesses, and his possession is therefore her possession. He cannot, therefore, by procuring administration to her effects, obtain in her right a share of the residuary estate, which was clearly designed by the testator for the younger children, who without it would be portionless. *Moneyppenny v. Dering* (a), *Harrison v. Round* (b), *Chadwick v. Doleman* (c). The period at which the interests of the children in the residuary personal estate must vest, and their capacity of taking be determined, is after the decease of the testator's wife and daughter and *John Bennett* the elder,—or the period of distribution,—and the interest of the daughter in the settled estates became vested at the same time, which excludes her from the double provision: *Matthews v. Paul* (d). In construing testamentary provisions made for

(a) 2 De Gex, M'N. & G., 159,
 166, 188.
 (b) Id. 190.

(c) 2 Vern. 528.
 (d) 3 Swanst. 328.

the benefit of classes of individuals (especially those classes for whom the testator, being the parent or standing in loco parentis, is bound to provide), the Court is more guided by the general scope and intention of the provision than by any peculiar phraseology.

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Mr. Rolt and Mr. Fane, for the husband and personal representative of *Lucy Harriet*, contended, that, according to the intention of the will, and in conformity with its expression, the estate of the eldest daughter was entitled to participate with those of the younger daughters in the residuary personal estate of the testator; for the limitations excluded only a child entitled in possession to the devised estates, and which the eldest daughter did not become. On attaining her age of twenty-one, which took place in 1823, as well as at the time of the recovery and resettlement of the estates in 1833, the estate of the tenant for life, *Aylmer Bourke Lambert*, was still in existence, and at the termination of that estate in 1842, the life estate of *John Bennett*, the father, took effect, and remained in existence at the death of *Lucy Harriet* in 1845. Even if she had actually become entitled in possession to this estate under a different title, it would not then be such an acquisition as would exclude her: *Spencer v. Spencer* (a), *Taylor v. Earl of Harewood* (b), *Adams v. Bush* (c).

VICE-CHANCELLOR.—The operation which it is in this case contended the Court should give to the words of the residuary bequest, which exclude from the benefit of it “any child who should by virtue of the limitation thereafter contained be entitled in possession” to the estates referred to, goes far beyond any of the cases which have been cited, and, as I believe, any that have before occurred.

Judgment.

(a) 8 Sim. 87.

(b) 3 Hare, 372.

(c) 6 Bing. N. C. 654.

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In the case of *Matthews v. Paul* (a), it seems impossible to say that the fund there in question was not vested in the children, subject to be divested by their death under twenty-one. In the present case the testator may by his will have manifested a general intention that the money and the estate should not go in the same channel; but, if that be so, it has been very imperfectly carried out; and the language in which that object has been supposed to be expressed cannot, I think, be applied to the state of things which has actually happened. I am not here asked to treat as a younger child one who has become an eldest child; but, supposing for this argument that the estate had remained as it stood limited at the death of the testator, I am asked to say that a daughter who died before the fund in question became distributable, is excluded from participation in it because her heir in tail, "by virtue of the limitation" contained in the will, has come into possession of the settled estates. No authority can be found for holding that the executor of a person, who, under the bequest in the will, if unqualified, would take the personal estate, is excluded because the subsequent heir in tail has come into possession of other property, which the testator has shewn it to be his intention that a different person should take.

The estates have here been the subject of the recovery and further settlement of 1833, and the question would then arise, whether the daughter takes the settled estates by virtue of the limitation contained in the will. This would be the case if the effect of the subsequent dealing with the estate has not been to displace the fee; and the fee would not be displaced where the recovery operates simply to enlarge the estate into a fee, nor where a mere charge or mortgage has been made, which is considered as having only a temporary purpose, and the party takes the estate subject

(a) 3 Swanst. 328.

to the old uses, but minus the charge. The case of *Harrison v. Round* (a) was one in which the sum raised by way of charge had come to the possession of the persons entitled to the estate. The charge was created by the father and son; and Lord *St. Leonards* observes, that the son took the estate in truth "under the limitations of the settlement. The settlement gave it to him originally, the recovery deed restored it to him, the mortgage deed kept it still in him, and no act was done to take it from him" (b); and he held, that, there being no evidence of the manner in which the money was appropriated, it must be regarded as having been received by the father and son in respect of their different interests.

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In the case now before me the father joined with the daughter in the resettlement of the estate, declaring the uses of the recovery, and an entirely new set of limitations were introduced, and the whole original fee was displaced. It would be very difficult in such a state of things to arrive at the conclusion that the daughter took the estate under the original limitations contained in the will, although it is, no doubt, true that trusts of this description are not construed so rigorously as clauses which create shifting uses.

If it were necessary to determine the period at which the interests of the children vested in the property in question, I should hold the true construction to be, that they vested at the ages of twenty-one or marriage, in all persons except the person whose interest was then defeated by the effect of the exception of the child who should be entitled to the estate under the subsequent limitations in the will. The judgment in *Matthews v. Paul*, however, seems to say that the interest may be divested at any period up to the time of distribution, and I rest my decision, not on the time of the vesting of the

(a) 1 De G., M'N., & G. 190.

(b) *Id.* 202.

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interest, but on the fact that the legatee never became entitled in possession to the settled estates, either under the limitations contained in the will or otherwise.

July 1st.

CHARLTON v. RENDALL.

Where a testator had directed, that, in the event of the marriage of his daughter, a certain portion of his property should be secured to her and the issue of her marriage, by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court, on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband.

P. P. RENDALL, the father of the Plaintiff *Rachel Martha Pinckney*, by his will, dated in 1831, devised his real estate to trustees and their heirs upon trust for sale, and to stand possessed of the proceeds upon trust to apply so much of the interest and annual produce thereof as the trustees might think proper in the maintenance and education of his daughter the said Plaintiff, then *Rachel Martha Rendall*, until she should attain the age of twenty-eight years, or be married under that age, with such consent as therein mentioned; and in the event of her marriage with such consent, the testator thereby directed, authorised, and empowered his said trustees or trustee for the time being to secure to his daughter, and the issue of her marriage, by a settlement, or some other good and sufficient assurance in the law, such part of the said trust fund as should amount to two-thirds at the least, in such manner as his said trustees or trustee for the time being might think fit and advisable, such settlement being for the benefit of his said daughter and her issue.

The will then contained directions to the trustees to invest the surplus of the annual produce of the trust fund which should not be applied in the maintenance and education of the said Plaintiff, in order that the same might accumulate for her benefit, and to transfer to her such trust funds and accumulations, for her own use and benefit, on

her attaining such age of twenty-eight years, or marrying under that age with the consent aforesaid. And the testator bequeathed his residuary personal estate upon the like trusts as were thereinbefore declared of the proceeds of her real estate.

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By a settlement of the 31st of December, 1852, made previous to the marriage of the Plaintiff *Rachel Martha Pinckney* with her husband *John Pinckney*, (and which marriage, with such consent as aforesaid, took place on the 4th of January, 1853), it was agreed, among other things, that the trust funds therein mentioned, consisting of the proceeds of the real estate and the residuary personal estate devised and bequeathed to the Plaintiff, *Rachel Martha Pinckney*, by her father as aforesaid, should be transferred to trustees as therein mentioned, and that two equal third parts thereof should forthwith, in pursuance of the directions in the said will, be settled and secured for the benefit of the said *Rachel Martha Pinckney* and her issue, according to the rules of equity in such cases, and under the approval and direction of the Court of Chancery, if such approval and direction could be obtained. And it was thereby provided that the settlement to be made of the said two-thirds should settle and assure the same, so far as the rules of law and equity would allow, upon and for trusts and purposes, and with, under, and subject to powers and declarations similar to those thereafter agreed and declared of a certain sum of 5036*l.* 12*s.* 8*d.* Consols, and with all such powers and provisoes as are usual in such cases; but, nevertheless, with full power for the parties thereto to consent to any variations or additions the Court might think fit to make.

The 5036*l.* 12*s.* 8*d.* Consols were thereby settled upon trust for the said *Rachel Martha Pinckney* for her life, for her separate use, without power of anticipation, and after

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her decease, upon trust for such person or persons, for such period or periods not extending beyond the lifetime of *John Pinckney* the husband, for such intents and purposes, and under and subject to such powers and declarations, as the said *Rachel Martha Pinckney* should by will appoint, and subject thereto in trust for the children of the said marriage as therein mentioned, with a limitation in default of issue to the next of kin of the said *Rachel Martha Pinckney*.

The bill prayed that the Court would approve of a proper settlement of the two-thirds of the testator's estate, according to the directions of the will, and that the other third might be paid to the trustees of the said marriage settlement upon the trusts thereby declared of the same; and a question was raised, whether the direction of the testator to secure two-thirds of his estate to his daughter and the issue of her marriage, would warrant the introduction into the settlement of a power enabling the daughter by her will to appoint that portion of the estate to her husband for his life.

Mr. *Hobhouse* and Mr. *Wickens*, for the different parties.

Judgment.
 —

The VICE-CHANCELLOR held, that a power of appointment to the husband for his life by the will of the wife might be properly introduced into the settlement, in conformity with the agreement contained in the marriage settlement of the 31st of December, 1852, made with the approbation of the surviving trustee of the will, and to which he was a party; and which agreement, or articles, he directed to be made an exhibit in this cause.

See *Dickinson v. Mort*, 8 Hare, 178.

1853.

IN THE MATTER OF
THE TRUSTS OF THE WILL OF JAMES RICKIT. July 8th.

JAMES RICKIT, by his will, dated the 1st of February, 1845, after directing his debts and funeral and testamentary expenses to be paid, and appointing his wife *Lucy Rickit*, and *Thomas Powell*, his executrix and executor, gave all his household goods and furniture, plate, linen, watches, china, glass, books, stock in trade, book debts, and all the rest, residue, and remainder of his personal estate and effects, of what nature or kind soever, and wheresoever situated, to his wife *Lucy Rickit*, for her use during her life; and after her decease, he directed as follows:—"I direct the said *Thomas Powell*, my executor, to sell and dispose of all and singular the residue of my said estate and effects, and divide the proceeds thereof equally between my brothers, *Stephen Rickit* and *William Rickit*, and my niece, the daughter of my late sister *Sarah*, to whom I give and bequeath the same to and for their own absolute use and benefit."

A legacy given by the testator to his "niece, the daughter" of his late sister *Sarah*,—*Held*, to be taken by his nephew, the son and only child of his deceased sister *Sarah Ann*.

The testator died soon after making his will, leaving the said *Lucy Rickit*, his widow, and his said brothers, *Stephen* and *William*, a sister whose christian name was *Silson*, not mentioned in the will, and *William Wand*, the son and only child of the testator's then deceased sister, *Sarah Ann Wand*. The testator had had no other sister of the name of *Sarah* except the said *Sarah Ann*, who had married a person of the name of *Wand*, the father of the said *William Wand*, and he had no niece answering the description contained in the will.

The residuary fund had been paid into court under the Trustee Relief Act, and the third share thereof bequeathed

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to the niece, the daughter of the sister *Sarah*, was claimed wholly by *William Wand*, the son of *Sarah Ann*, on the one hand, and by him and the rest of the next of kin of the testator, as in case of intestacy as to that share, on the other.

Mr. *Nalder*, for the petition, in which all the claimants joined, referred to *Ryall v. Hannam* (a), in which numerous cases of misdescription are cited.

VICE-CHANCELLOR :—

Judgment.

The testator in the will alludes to the fact of his sister *Sarah* being then dead, by referring to her as his "late sister *Sarah*;" and then he intimates that the legacy is intended for an object who must be living at the date of his will, and must be the child of a sister who was then dead, and of a sister who bore the name of *Sarah*. All these conditions of the description concur in the person of *William Wand*; he is also the only child of *Sarah*; and I do not think that the fact of his being a male, instead of a female, is of sufficient weight to exclude him from the benefit of the gift. The case before Lord *Langdale* (b) is a much stronger case than the present.

(a) 10 Beav. 536.

(b) *Ryall v. Hannam*, ubi supra.

1853.

WARTER *v.* ANDERSON.

12th July.

THE bill was filed by two new trustees, appointed by deed of the 17th of May, 1851, of a marriage settlement made on the 3rd of September, 1821, against the executor and universal legatee of the last survivor of the two trustees originally appointed of such settlement; and it prayed that an account of the dividends of the trust funds received by the Defendant and his testator might be taken, and payment made out of the estate of the testator, and by the Defendant personally; and that the Defendant might be decreed to transfer to the Plaintiffs a principal sum of 1530*l.* Bank 3*l.* 5*s.* per cent. Annuities, the settled fund, and to deliver up to them the said settlement, and all other papers relating to the trust estate.

The representative of a deceased trustee, who is called upon to transfer the trust property to new trustees, is not entitled to be furnished, at the expense of the fund, with a duplicate of the instrument appointing such new trustees, nor is he entitled, at the expense of the fund, to an attested copy of the deed creating the trust.

The bill stated the death, in 1850, of *Anderson*, the last survivor of the two original trustees, the constitution of *Anderson*, the Defendant, as his legal personal representative, and the appointment of the Plaintiffs as new trustees, by deed of the 17th of May, 1851; that notice of such appointment was given to the Defendant and his solicitors, to whom a copy of the deed had been given, and who had examined it with the original. The bill alleged that the Defendant refused to transfer the stock or deliver up the settlement, unless they were furnished with an attested copy of the settlement, and a duplicate of the deed of appointment of new trustees, at the expense of the trust estate, and unless certain costs were paid to his solicitor out of the same estate; and that certain costs had already been taxed and paid to them.

It appeared in evidence, that, after the payment of cer-

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after having paid a considerable bill of costs, to find that they would be required to pay further costs, and that now, for the first time, in this late stage of the correspondence, a duplicate of the deed of May, 1851, is required, of which the Defendant had a copy, which had been examined with the original. The trustee then threatens to pay the money into Court, which, however, is not done, and the present bill is filed. I quite feel the unpleasant position in which a trustee is left, in not having in his hands full evidence of the appointment of new trustees; and I know the request for a duplicate has been often made by conveyancers, but I do not know of any case where it has been given. The parties who are appointed have a right to call on the old trustee to act on the deed of appointment; and the latter, on a clear title being shewn, cannot refuse to pay over the money on the ground that he is not furnished with the deed. If it were a case at law—against the trustee,—a case of ejectment for instance, there could not be a moment's doubt that the Plaintiffs must succeed. In this Court a trustee is held entitled to reasonable protection. He has a right to have an examined copy, and that he took in the present case. If the retiring trustee requiring for his own satisfaction more than is his strict right, had asked for a duplicate of the deed at his own expense, the Court might have thought it a reasonable request, and, on the question of costs, have considered that so reasonable a request, made before the bill was filed, should have been complied with. In the circumstances of the present case, the Defendant has placed himself in the position of having a bill filed against him, by making demands upon which he was not entitled to insist.

In the direction to tax the costs, the Defendant was not allowed the costs of the suit, or of the correspondence as to the attested copy or duplicate instrument, or of the opinion of counsel relating thereto.

1853.

SIR HORACE ST. PAUL *v.* THE BIRMINGHAM, WOLVERHAMPTON, AND STOUR-VALLEY RAILWAY COMPANY. *July 13th.*

A SPECIAL CASE.—The Act incorporating the Defendants, enabled them to make a railway over certain lands in the parish of Tipton, belonging to the Plaintiff; and the Lands Companies and Railways Clauses Consolidation Act, 1848, were in the usual form, by reference, made part of such Act. In March, 1850, the agents of the Plaintiff and of the Defendants signed a contract, which was as follows :—

“The Company are to pay for 2a. 1r. 12p. of freehold land, and for two dwelling-houses, and compensation for the loss of two coal pits, and for the cost of removing and rebuilding casting-houses, dressing-shops, stores, wheelwrights’ shops, and for all other loss and inconvenience occasioned to Sir *Horace St. Paul’s* property, by reason of the Company’s works, which are to be executed according to the altered section, the sum of 4,069*l.*, but this sum is exclusive of tenants’ compensation. The whole of the property is in the occupation of tenants holding from year to year, or in Sir *Horace St. Paul’s* own occupation.”

On the 15th of May the Company’s solicitor waited upon the Plaintiff’s solicitor, and asked for permission to take possession of the land, and offered to deposit the purchase money temporarily in joint names in the bank of the *Birmingham Town & District Banking Company*, (the Defendants’ bankers,) pending the investigation of the

A landowner agreed to sell land to a Railway Company, and the Company, requiring immediate possession of it,—offered to deposit the purchase money in a certain bank in the joint names of the vendor and the chairman of the Company, pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, and stipulated also that he should be paid 5*l.* per cent. interest from the time possession was given. The deposit was accordingly made, and possession taken by the Company. Before the conveyance was completed, the bankers with whom the money stood, became bankrupt, and most of it was lost:

Held, that the loss must be borne by the vendor, the deposit having been made and accepted as payment, and not merely as security.

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title and completion of the conveyance; but the Plaintiff's solicitor proposed, that, subject to the approval of the Plaintiff's land agent, the Company should deposit the amount in Messrs. *Ruffords & Wragge's* Bank. No definite arrangement was made at this interview, but the Plaintiff's solicitor promised to communicate with the Plaintiff on the subject. On the 28th of May, 1850, the Defendants' solicitor wrote to the Plaintiff's solicitor as follows:—

"We are waiting to hear from you as to the proposed investment of the purchase money pending completion of the conveyance. May we give the contractor possession if it is much wanted."

The words, "proposed investment" in this letter, referred to the said proposal made orally on the 15th of May preceding. On the 1st of June the Defendants' solicitor wrote to the Plaintiff's solicitor, as follows:—

"I expect to have the cheque for Sir *Horace's* purchase money on Monday. May I then, on setting it apart, give the contractor possession, being personally responsible for the making of the investment when you are prepared. I am afraid of getting blamed if there be further delay. A line by return."

To this the Plaintiff's solicitor returned the following reply:—

"4th June, 1850,

"Upon your client's purchase money being deposited in the bank of Messrs. *Rufford & Wragge*, in the joint names of Sir *Horace St. Paul* and the Chairman of your Company, and on receiving your undertaking that the purchase be completed with as little delay as possible and that your clients will pay Sir *Horace* 5*l.* per cent interest on his purchase money from the time of en-

until completion of the purchase, we will consent, on behalf of Sir *Horace St. Paul*, to your Company's contractor having immediate possession of the land, &c., at Tipton, which they have agreed for. We must require you, before taking possession, to arrange with Messrs. *Deeley & Thomas*, who now occupy the property, and whose consent is necessary to be obtained by your clients."

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The letter of the 4th of June was not replied to; but on the 3rd of July, 1850, the solicitor of the Company deposited 4,000*l.* in the bank of Messrs. *Ruffords & Wragge*, (who were the bankers of the Plaintiff and not of the Company,) in the joint names of Sir *Horace St. Paul* and Mr. *Letsum*, the Chairman of the Company, and on the 4th of July the Defendants' solicitor produced to the Plaintiff's solicitor the deposit note for the 4,000*l.*; and on the same day the Company by their contractors, with the consent of Messrs. *Deeley & Thomas*, whose claim had been satisfied, entered into possession of the property, and continued to retain such possession. The possession, in fact, was taken by the Company about two days before the deposit was made; and the Plaintiff's solicitors, having required the Company to quit possession, withdrew the notice to that effect on such production of the deposit note.

Before any conveyance had been executed by the Plaintiff to the Defendants, Messrs. *Ruffords & Wragge* became bankrupts; and the case stated that their estate would pay a dividend of about 4*s.* in the pound only; and the question was, whether the loss sustained in respect of the 4,000*l.* should be borne by Sir *Horace St. Paul*, or by the Company, or by both, and if by both, in what proportions.

Mr. *Rolt* and Mr. *G. L. Russell* for the Plaintiff:—

Argument.

The question is, whether the deposit of the money in the

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bank of *Ruffords & Wragge* was by way of security or as payment. It was clearly as security only. The Company substituted for their own convenience that mode of security, instead of adopting that which, in such cases, is pointed out by the 85th section of the Lands Clauses Consolidation Act (a). The only peculiarity in the case is, that, when the proposal of a deposit is spoken of, the Plaintiff suggests a particular place of deposit, to which the Defendants' solicitor might have objected, if he had any doubt of the stability of that particular bank, but to which he made no objection. It must be observed, that the whole transaction as to the deposit forms no part of the original contract, but is in truth a variation of or addition to the terms of the contract, not sought for or desired by the Plaintiff, but adopted by the Company purely for their own benefit and convenience: Qui sentit commodum sentire debet damnum. The Plaintiff had nothing to gain by the deposit, and, in stipulating for the interest to be paid by the Company, shews that his solicitor did not adopt the deposit as an investment, or look to the bankers as his creditors, or to the money as his own. Whatever interest the bankers had paid on the amount of the deposit would have been payable to the Company, not to the Plaintiff, for the Plaintiff would receive his interest from the Company at 5l. per cent. in any event. The deposit was not made as the price of the land, but as the price of the accommodation of having immediate possession; and it is not undeserving of remark that the money paid into the bank was not the entire purchase money of 4,069l., as must have been the case if it had been intended as payment to the vendor: *Roberts v. Massey* (b), *Acland v. Gaisford* (c).

The *Solicitor-General*, Mr. *Craig*, Mr. *Hedge*, and Mr. *Lambert* for the Company.

(a) 8 & 9 Vict. c. 18. (b) 13 Ves. 561. (c) 2 Mad. 28.

The vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor: *Green v. Smith* (a), *Pollexfen v. Moore* (b). The payment of purchase money into court is payment to the vendor, and the only qualification of the vendor's right to the money is, that it cannot be interfered with except upon notice to the purchaser. [VICE-CHANCELLOR.—The payment into court stops the running of interest. Here you are to pay interest.] That is by special agreement; and such a stipulation shews that the payment was not by way of investment as a security, but that the vendor considered this to be such a payment to himself, that, unless he stipulated for interest, none would run. The cases of *Burroughes v. Browne* (c), *Smith v. Jackson* (d), and *Doyley v. The Countess of Powis* (e), are cases of the application of the common rule, which, as between vendor and purchaser, in such cases throws the risk on the vendor. If the deposit in this case be not pro tanto payment, the deposit paid to an auctioneer is not a payment in respect of the purchase money; but that deposit is always taken, on the completion of the purchase, as a part payment of the purchase money. The 85th section of the Lands Clauses Consolidation Act has no application to the circumstances of this case. It relates only to cases of ex parte payments into court where there is no special contract, as existed in this case.

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VICE-CHANCELLOR :—

The case must depend entirely upon the correspondence, and the exact nature of the contract entered into between the parties. The first point put by the Solicitor-General,

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- (a) 1 Atk. 572, 573.
- (b) 3 Atk. 272, 273.
- (c) 9 Hare, 609.

- (d) 1 Mad. 618, 620.
- (e) 2 Bro. C. C. 33.

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is one in which I cannot at all acquiesce. The way in which he first put the case was this, that inasmuch as when a contract has been entered into on the behalf of two parties, the one to buy and the other to sell, the estate, which forms the subject of the contract, becomes from that moment the property of the purchaser, and he is liable to all the incidents or accidents that may happen to the property; so, on the other hand, the money becomes from that instant the property of the vendor, and he is liable to all the accidents which may occur to it. In truth, that view of the question does not in any way assist the Court in arriving at a decision in this particular case; for although, when the contract is completed, the rights of the parties are ascertained from the moment it was entered into to be such as are stated by the Solicitor-General, yet, until the money is paid, so long as it remains in the undistinguished mass in the pocket of the purchaser, it is impossible to say it is not the purchaser's money. In *Roberts v. Massey* (a), Sir William Grant holds clearly, that, even setting the money apart with notice to the vendor, does not throw any liability upon the latter, or oblige him so much as to intimate his dissent from that course, in case he does not either expressly or implicitly assent to it. I do not think, therefore, that reference to this principle very much advances the consideration of this case. The real point now to be decided is, whether, under the correspondence which has taken place, there has been a payment of the purchase money on the part of the purchaser assented to by the vendor? For that purpose the case of *Burroughs v. Browne* (b) is of some importance; and, as in that case, it is necessary to look at the position of the parties, and at the exact words of the letters which have passed, in order to arrive at a conclusion.

The original contract was, that the vendor was to sell, for

(a) 13 Ves. 561.

(b) 9 Hare, 609.

the price of 4069*l.*, certain property, which the Company were to buy. Nothing was said as to the time of the completion of the contract; and under that form of contract, if there had been tardiness on the part of the Company, the vendor might have filed his bill to have it completed; but, until its actual completion, the Company were not bound to take possession or to pay the purchase money. However, they want to obtain possession, and then a new state of things occurs. They cannot take possession without the assent of the vendor, and although they have a contract, a new arrangement and a new term of agreement must be come to before that can be done. The Company say, that strictly speaking, under any circumstances, the parties taking possession are bound, by the law of this Court, to pay the purchase money; they cannot take the estate and retain the purchase money too. The Company however did not say that they wished to take possession and to pay the purchase money and waive any question as to the title. They said, in effect, that they did not wish to do either of the two latter things; they wished to take possession and at the same time to reserve the power of investigating the title, whilst the purchase money should be handed over. The Company's agent proposes to deposit the purchase money temporarily in certain joint names with the *Birmingham Banking Company*, pending the investigation of title and the completion of the conveyance; and the other side say their proposition is, to make the deposit in Messrs. *Ruffords & Wragge's Bank*. There is no written paper expressing the terms of this first proposal on either side; but it is admitted that the proposal was, not to pay, but to deposit the money in some place to be agreed upon, in the names of the two parties. About a fortnight later, the Company's agents wrote thus:—"We are waiting to hear from you as to the proposed investment of the purchase money pending the completion of the conveyance." Then comes the letter of the 1st June, in which the Company's agent says, "I expect to have the cheque for

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Sir *Horace's* purchase money on Monday. May I then, on setting it apart, give the contractor possession, being personally responsible for making the investment when you are prepared." On the 4th, the vendor's agent answers,—“ Upon your client's purchase money being deposited in the bank of *Ruffords and Wragge*, in the joint names of Sir *Horace St. Paul* and the Chairman of your Company, and on receiving your undertaking that the purchase shall be completed with as little delay as possible, and that your client will pay Sir *Horace* 5*l.* per cent. on his purchase money from the time of entry until completion of the purchase,” they will consent to immediate possession being taken. Now, if the investment mentioned in these letters of the 1st and 4th of June, instead of payment into a bank, had been, as in the case of *Burroughes v. Browne*, an investment in stock, I should have had no doubt that it was an investment of the purchase money not made speculatively on the responsibility of the purchaser, but set apart with the consent of Sir *Horace St. Paul*. Instead of such an investment, however, the payment assented to and made is a payment into a bank. Mr. *Rolt*, in his reply, commented on the term introduced on behalf of the purchaser, that interest should notwithstanding be paid. There is no statement as to whether the bank were to allow any interest on the fund deposited; if none were to be allowed, the stipulation as to interest was necessary on behalf of the vendor, the purchasers having possession of the land; and so also it might have been if the bank should allow interest, as that interest might be less than 5*l.* per cent. The vendor's agent might therefore reasonably add the term, that he would require interest from the time of the entry of the purchasers into possession, when his receipt of rents from the land would necessarily cease. In this manner the purchase money is dealt with, and possession of the land is obtained.

Upon these facts I ask myself this question,—suppose an action had been brought by Sir *Horace St. Paul* for the money, looking to the whole of the letters, would it be possible to say, that the purchaser could not plead accord and satisfaction, except as to the 69*l.* remaining unpaid? In the correspondence the money is all through dealt with as purchase money, and as purchase money it was deposited.

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I am of opinion, that accord and satisfaction to that extent would have been a good plea. It does not seem to me possible to adopt the only other alternative, that it was merely intended as a security. The proposal was no doubt for the benefit of the Company; but I cannot notice the speculations on either side as to the cause of the loss. If the Company had not required to take possession before the purchase was completed, no doubt it would not have occurred; neither would it have occurred if the Plaintiff's agent had acquiesced in the deposit being made in the bank suggested on the part of the Defendants. The proposal being, as I have said, for the benefit of the Company, the Plaintiff might have been advised to say, I do not want the money paid down: take your own course and I shall take mine; you must wait until I give you the conveyance: or he might have answered, "I shall insert the stipulation that it shall not be at my risk;" he did not, however, do so. He only said, "You shall have possession, paying your purchase money into the bank, and paying me 5*l.* per cent. interest." I should have to get rid of every word in the letters and correspondence, if I were to treat this as otherwise than an actual parting with the purchase money; and the moment you ascertain that it is purchase money, it follows that it is the property of the vendor and is held at his risk. The only question I have had to trace through the evidence is, whether, in point of fact, the vendor consented to the particular manner in which his purchase money should be appropriated and set apart; and it being so paid with his

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consent and concurrence, I am sorry to say that he must bear the loss.

It has been said, that it would in such a case be the most equitable arrangement that the parties should bear the loss equally between them, but I do not know any legal way of arriving at such a determination. I have been forced to conclude that the purchase money, which has been lost by the bankruptcy, was the property of one of the parties. It could not be held that it belonged to both.



July 20th &
 21st.

WOODS v. TOWNLEY.

A residuary bequest to the nephews and nieces of the testatrix who should be in England at the time of her decease, and the children of such of her nephews and nieces as should be then dead living in England, such children taking only their, his, or her parent or parents' share; and to her great niece, J., and the children of her deceased niece,

M., such last-mentioned children only to take one of such shares in right of their mother, equally among them:—*Held*, that two nieces, who at the date of the will and at the death of the testatrix were settled in America were excluded, and that two nieces who at the time of the testatrix's death were in Ireland—one with her husband on duty with his regiment, and the other visiting her—were not excluded.

That J. and the children of M. were entitled to take shares as members of the class of children, and also other shares as special legatees.

THE residuary bequest in the will of *Margaret Preston*, dated in 1847, was in the following words:—"And as to all the residue and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, I give and bequeath the same unto and equally amongst such of my nephews and nieces as shall be in *England* at the time of my decease, and the children of such of my nephews and nieces as shall be then dead, living in *England*, such children taking only their or his or her parent or parents' share, and my great niece *Jane Gray*, of *London*, and the children of my deceased niece *Margaret Wells*, such last-mentioned children only to have and take one of such shares in right of their mother, equally amongst them, and to their several and respective executors, administrators, and assigns."

The testatrix died on the 11th of October, 1850. She left surviving her seven nieces, and six children of deceased nephews and nieces. Of these six children of deceased nephews and nieces, three, *Agnes*, *Amelia*, and *Alfred*, were the children of her deceased niece *Margaret Wells*, separately mentioned in the residuary clause of the will above stated; and another, *Jane Gray*, also separately mentioned, was the child of a deceased nephew.

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The Master found that all the said nieces and children of deceased nephews and nieces were living in *England* at the time of the death of the testatrix, except as thereafter stated. And the Master then found that *Mary Taylor*, spinster, afterwards *Mary Graeff*, widow, and *Caroline Taylor*, spinster, afterwards the wife of *Robert Marshall Allen*, were two of the nieces of the testatrix, and that they and their half sister *Ann Newby Park*, resided, up to a short time after the 8th day of August, 1843, in a house, No. 29, in *Grafton-street, Fitzroy-square*; and that, on the said 8th day of August, 1843, the said *Caroline Taylor* intermarried with *Robert Marshall Allen*, her present husband, and quitted the said house, and that she has ever since lived with her said husband; and shortly after the said marriage and in the autumn of that year the said *Mary Graeff* (then *Mary Taylor*) and *Ann Newby Park* quitted the said house and gave up housekeeping. That at the time of the said marriage the said *Robert Marshall Allen* was, and has ever since been, and now is, an army surgeon in the service of her Majesty; and that, shortly after his marriage, he went with his said wife to the *Cape of Good Hope*, to join his regiment, which was then quartered there, and he and his said wife were there with his regiment on the 24th of May, 1847, and they remained there until 1848, when they returned to *England*; and they remained in *England* until March, 1849, when he was appointed to her Majesty's 6th Regiment of Foot Guards, which was then stationed in

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acquaintances, resided and now resides, and where she has always since kept the greater part of her wearing apparel and other things, and where she has since had and has her only home. That the said testatrix had two nieces, *Mary Alderson* and *Alice Dodgson*, who are sisters. And the said *Mary Alderson*, in the year 1830, married *William Alderson*, and went to reside with him permanently in the United States of *America*. And for some years before the said year 1830, the said *Alice Dodgson* resided with the said testatrix; but in that or the following year, the said *Alice Dodgson* went to reside in *America* with the said *Mary Alderson*; and they so resided there on the 24th day of May, 1847, (the date of the testatrix's will), and from thenceforth down to and ever since the death of the said testatrix were, and have been, permanently resident in the United States of *America*.

The questions submitted to the Court were, first, whether *Mary Graeff*, *Caroline Marshall Allen*, *Mary Alderson* and *Alice Dodgson*, or any of them, were excluded from the benefit of the bequest as not being or living in *England* within the terms of the will; and secondly, whether the especial mention of the great niece *Jane Gray* and the children of *Margaret Wells*, entitled them to a greater or other share of the residuary estate than that which was given to the children of deceased nephews and nieces described generally, without such special reference.

Argument.

Mr. *B. Chapman* for the trustees.

Mr. *Hardy* for *Mary Graeff* and *Caroline Marshall Allen*.

Mr. *Rasch*, for *Jane Gray*, claimed a share as given to her specifically in addition to the share she would take under the general description as the child of a deceased nephew.

Mr. *Tennant*, for the children of the deceased niece *Margaret Wells*, claimed likewise an additional share.

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Mr. *Bagshawe* for the other nephews and nieces and children of deceased nephews and nieces.

The cases cited were *Warrington v. Warrington* (a), *Say v. Creed* (b), and *Gordon v. Whieldon* (c).

The VICE-CHANCELLOR, on the first question, said he had no doubt, that, if a legacy had been given to a person, with a condition expressed that he should be "living in *Suffolk*," and his abode had been in that county, but he had been at the time taking a drive, or making an excursion in the county of *Norfolk*, the latter circumstance would not have deprived him of the benefit of the legacy. The testatrix had varied the words from being in *England* to living in *England*, but there was no reason to suppose that she did not mean the same thing by the different expressions. The words were used rather in apposition than in opposition. He was of opinion that the residence of one of the nieces in *Ireland*, and the visit of her sister to that place, at the time of the death of the testatrix, did not exclude them from the legacy. There were two nieces who had at the date of the will permanently settled in *America*, which was a fact to be considered in the construction of the bequest. The nieces in *America* were excluded. With regard to the second question, little assistance could be gathered from authority. The safest course would be to give to every word its literal construction. If *Jane Gray* had not been interposed, the testatrix might have meant no more than that the children of *Margaret Wells* were to take, whether

Judgment.

(a) 2 Hare, 54. (b) 5 Hare, 580. (c) 11 Beav. 170.

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living in *England* or not. It was, however, impossible to imagine any reason why her name should have been interposed, unless it were intended for the purpose of preference. It was something analogous to the case of a gift to one of a class by name for life, with remainder to the class, in which case the tenant for life would take as it were a second interest. The inclination of his opinion was, that the testatrix did not intend to give a double interest to the children of *Margaret Wells*; but a different rule of construction could not be applied to the two cases, and therefore if *Jane Gray* took a larger share, the same must be attributed to the children of *Margaret Wells*. The only way of avoiding this effect would be by supposing that these children were not included in the class described as children of such of her nephews and nieces as should be dead: but this the Court could not upon any principle do.

The property would have to be divided into eleven shares, of which *Jane Gray* would take one, and also a share of another, as one of the class of children of a deceased nephew. In the same way the children of *Margaret Wells* would take among them two of such shares.

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PAGE v. SOPER.

July 22nd,
23rd.

BY a settlement, dated the 24th of October, 1800, a sum of 3500*l.* Consols was vested in three trustees, upon trust to pay, apply, and dispose of the interest, dividends, and annual proceeds thereof, as and when the same should from thenceforth become due and payable and be received, unto such person and persons only, and for such intents and purposes only, as the Plaintiff, *Elizabeth* (then the wife of *Edward Taylor Garnett*), should from time to time during her life (after such interest, dividends, and annual proceeds should become due and payable or applicable and not by way of anticipation thereof) by any writing or writings to be signed by her hand (notwithstanding her then present or any future coverture, and whether she might be sole or covert), direct or appoint of or concerning the same, and, in default of such direction and appointment, and in the meantime and from time to time until the said *Elizabeth Garnett* should make any such direction or appointment, should pay such interest, dividends, or annual proceeds, or so much thereof whereof or concerning which she should or might from time to time happen not to make any such direction or appointment as aforesaid, into the proper hands of the said *Elizabeth Garnett* to and for her own sole and separate use, exclusive of her then present or any future husband, who was not to intermeddle therewith, nor was the same to be in any wise subject to his control, debts, or engagements; but the receipts and discharges of the said *Elizabeth Garnett*, and of such persons as she should from time to time (in manner aforesaid) direct or appoint to receive all or any part of the said dividends, interest, or annual proceeds, should be good and effectual releases and discharges for such sum or sums of money as

Where trust funds were settled to the separate use of a married woman for her life, and after her decease upon trust for such persons as she should by will appoint, and, in default of appointment, for her executors and administrators,—she, having become a widow, applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment, and it was held that she was absolutely entitled to the trust funds, and the order was made accordingly.

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should be thereby expressed or acknowledged to be received; and from and after the decease of the said *Elizabeth Garnett*, then upon trust to stand possessed of and interested in the said capital sum of 3500*l.* Consols, and the interest, dividends, or annual proceeds from thenceforth to become due or payable in respect of the same, in trust for and for the benefit of such person and persons, and for such intents and purposes and subject to, with, and under such charges, conditions, provisoes, and restrictions, and in such manner as she the said *Elizabeth Garnett*, at any time or times during her life, by her last will and testament in writing, or any writing of appointment purporting to be or in the nature of her will, or any codicil thereto, to be by her signed in the presence of and attested by two or more credible witnesses (and which will or writing of appointment in nature of a will, notwithstanding her coverture, she was thereby empowered to make), should direct or appoint of or concerning the said trust premises, or any part thereof; and, in default of such direction or appointment, or in case any such direction or appointment should be made, then as to such parts thereof as to which no such direction or appointment should be made, or which should not be completely disposed of as aforesaid, upon trust for the executors or administrators of her the said *Elizabeth Garnett*, and should pay, assign, and transfer the same accordingly.

Edward Taylor Garnett, the first husband of the Plaintiff, died in 1802, and in 1810 the Plaintiff intermarried with *Thomas Page*. *Thomae Page* died in June, 1849, leaving the Plaintiff, his widow, surviving.

In August, 1849, the Plaintiff executed an appointment by way of mortgage of the said sum of 3500*l.* Consols to *France*, a trustee, to secure 1013*l.* and interest to *Eleanor Poyntz*, and 300*l.* and interest to *Mary Beck*.

The claim was filed by the Plaintiff *Elizabeth Page*, the trustee of the assignment of August, 1849, and one of the mortgagees (the other being a Defendant), against *James Soper*, the last survivor of the trustees appointed under the settlement of 1800, praying a declaration that the Plaintiff, *Elizabeth Page*, was under and by virtue of that settlement absolutely entitled to the said sum of 3500*l.* Consols, and that the Defendant *Soper* might be directed, by sale of so much thereof as might be necessary, to raise and pay the said mortgage debts of 1313*l.* and interest, and the costs of all parties to the suit, and to transfer the residue into the name of *Elizabeth Page*,—the Plaintiff offering, previously to such sale, payment, and transfer, to release her said power of appointment.

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Mr. *Rolt* and Mr. *Hawkins*, for the Plaintiff, cited *Holloway v. Clarkson* (a), where the power was to appoint by deed or will. In this case it was by will alone, but that did not render the power less capable of being released. The donee of the power applying to the Court as effectually discharged the power as any release by deed could do.

Argument.

Mr. *Smythe* and Mr. *Speed* for the several Defendants.

VICE-CHANCELLOR:—

My only reason for deferring my judgment, was, that I had a recollection of a case in which a gift to the executors and administrators of a person has been held to be equivalent to a gift to the next of kin of that person. The case I allude to is that of *Bulmer v. Jay* (b). But that case

Judgment.

(a) 2 Hare, 521.

(b) 4 Sim. 48; S. C., 3 My. & K. 197.

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has, to say the least, been disapproved of by Lord *Cottenham*, who, in *Daniel v. Dudley* (a), says, that the case of *Bulmer v. Jay* "stands alone." As far as my own opinion goes, I have no doubt upon the present case; but I do not feel myself at liberty, sitting here, to disregard the decision of Lord *Brougham*. The intention of the parties was probably the other way.

[Mr. *Rolt*, for the Plaintiff, referred to the case of *Devall v. Dickens*, before Sir *J. Wigram*, V. C., 28th June, 1845 (b), where a legacy was given to the separate use of the testator's daughter for life, and, after her death, upon trust for such persons as she should by will appoint, and, in default of appointment, in trust for her executors and administrators; and it was held, that such a limitation substantially gave the entire interest in the property to the legatee, his Honour observing, that he had in previous cases always held such to be its effect.]

VICE-CHANCELLOR.—I think, upon the whole, the case of *Devall v. Dickens* being before the same Judge as *Holloway v. Clarkson*, whose attention was called to the point, and the authority never having been the subject of appeal, I may follow it, and make the order which is asked by this claim.

I have no doubt upon the question myself; and, if I had decided the other way, it would have been solely from feeling myself bound by authority.

(a) 1 Phil. 1. 7. (b) Reported 9 Jur. 550.

1853.

ASPINALL *v.* THE LONDON AND NORTH-
WESTERN RAILWAY COMPANY.

July 18th to
20th & 25th.

IN February, 1847, *D. Sharp* and *E. Welsh* entered into a contract with the *Huddersfield and Manchester Railway Company*, to make and complete a certain branch line diverging therefrom, and to maintain the same for one year; and the company thereby agreed to pay the said contractors, from time to time, the sums of money therein mentioned, retaining 10 per cent. as a guarantee until the contract should be completed. The execution of the works was commenced and proceeded with by the contractors in pursuance of the contract, until the 22nd of April, 1848, when some arrangements were made between *Sharp* and *Welsh*, the object of which was to dissolve the partnership, and to admit a brother of *Sharp* into the partnership in his stead. The terms of the arrangement required that *Welsh* should account for the monies received and the work performed, and that thereupon notice of the dissolution should be duly inserted in the *London Gazette*. It was on the evidence made a question whether this agreement for dis-

Two persons contracted with a Railway Company to execute certain works, and, afterwards, progress had been made with the works, a judgment creditor of one of the contractors took in execution his share of the plant and effects, which the sheriff sold and assigned to the other contractor. The other contractor assigned the interest of the firm in the contract, and all the effects and monies due or to be-

come due in respect of the same, to a third person, by way of security, with power for such assignee to enter on the works and take possession and execute the contract. The said assignee some months afterwards took possession of the works and proceeded to complete them. The Company had notice of the execution and sale by the sheriff of the property of one contractor, and of the assignment to the other, and by the other to the said assignee, and they allowed the works to be continued by the two latter persons respectively, and made payments to them on account. The assignee having (after the insolvency of his assignor) filed his bill against the Company for an account of what was due from them in respect of the contract, and for a declaration that a release executed to the Company by the contractor whose share had been taken and assigned by the sheriff, was fraudulent:—*Held*, That the seizure in execution of one partner's share of the plant and effects operated as a dissolution of the partnership,—That the subsequent prosecution of the works by the other contractor, or his assignee, did not necessarily involve any new contract with the Company, but was consistent with that theretofore made,—That the contractor, or his assignee, who without objection from the Company prosecuted the works, could sustain a suit against the Company for payment of what had become due from them in respect of the works done under the contract: and,—That a release executed by the partner and contractor whose share of the partnership effects had been taken in execution, was void as against the other contractor and his assignee.

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solution had not been conditional on acts to be done by *Welsh*, which he had neglected; and it appeared that no notice of dissolution was inserted in the *Gazette*. On the 10th of May, 1848, a judgment creditor of *Sharp*, named *Charlesworth*, issued execution against him, under which possession was taken of the effects of *Sharp*; and thereupon *Welsh* gave notice to the company that the partnership between himself and *Sharp* had been dissolved, on the preceding 22nd of April, by mutual consent, that the sheriff was in possession of the effects of *Sharp*, and that payment by the company of all monies due or to become due in respect of the contract should be made to him, *Welsh*, alone. *Welsh* also represented to the company his position in consequence of the execution, and that it was impossible for the works to go on unless he received some pecuniary assistance, which assistance he stated that the Plaintiff, *Aspinall*, was willing to give him. A meeting of the directors of the company took place on the 23rd day of May, at which they came to a resolution that the payments in respect of the contract should in future be made to *Welsh* alone, if the Plaintiff should execute to the company a sufficient indemnity against any claim by or through *Sharp*. On the 24th of May, the sheriff executed an appointment to *Welsh* of all the undivided moiety, or other the share, right, and interest of *Sharp*, of and in the plant, goods, chattels, and effects belonging jointly to *Sharp* and *Welsh* as partners and contractors for the said branch railway. By an indenture, dated the following day (the 25th of May,) *Welsh*, in consideration of the sum of money which he paid to the sheriff having been advanced to him by the Plaintiff, and by way of security for the same, assigned to the Plaintiff the plant, goods, chattels, and effects in or about the said branch railway of him *Welsh*, or of the then late firm of *Sharp & Welsh*, and all his and their interest in the contract, and the full benefit and advantage thereof, and all and every sum and sums of money then due or thereafter to

become due or recoverable by virtue thereof, with power for the Plaintiff to enter upon and proceed with the works in default of payment of the principal sum and interest as therein mentioned. On the 2nd of June, *Welsh* gave notice to the company of the assignment to him by the sheriff of *Sharp's* interest in the property, and stated that a bond of indemnity against any claim by or through *Sharp* was in course of preparation. A bond to this effect was on the 6th of June executed by *Charlesworth*, the execution creditor, to *Welsh*.

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During, and after these transactions, and, as it appeared, from the 22nd of April, 1848, until the 25th of August following, the works comprised in the contract were carried on by *Welsh* alone. On the 25th of August, the Plaintiff, acting under the powers contained in his assignment of the 25th of May, took possession of the plant and effects thereby assigned to him, and thenceforth proceeded with the works in execution of the contract, giving notice at the same time to the company of the assignment to him, and requiring them to pay to him all monies due or to become due to *Welsh* in respect of the contract.

In December, 1848, *Welsh* took the benefit of the Acts for the relief of Insolvent Debtors.

The estate and liabilities of the *Huddersfield* and *Manchester* Railway and Canal Company became by Act of Parliament (a) vested in the *London* and *North-Western* Railway Company, and the contracts entered into with the former were made valid and binding for and against the latter (b).

The Plaintiff, on the completion of the works, claimed

(a) 10 & 11 Vict. c. 159. L&P.

(b) Sect. 4.

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from the company a balance of 7457*l.*; and, in February, 1850, he brought an action against them in the names of the contractors *Sharp* and *Welsh*, to recover such balance. The Defendants, the company, thereupon settled an account with *Sharp*, and *Sharp*, on the 15th of February, executed to the company a release of all demands in respect of the contract.

The Plaintiff then filed his bill against the company, and against *Sharp* and the assignees of *Welsh*, praying a declaration that the release of the 15th of February, 1850, so executed by *Sharp*, was fraudulently obtained by the company, and was void as against the Plaintiff, and that the same might be decreed to be delivered up to be cancelled, and that an account might be taken of the monies remaining due and unpaid by the company in respect of the contract of February, 1847, and the interest due in respect of the same, and that the same might be decreed to be paid to the Plaintiff as mortgagee in possession under the assignment of the 25th of May, 1848.

Argument. Mr. Rolt, Mr. Daniel, and Mr. Humphry, for the Plaintiff.

The *Solicitor-General*, Mr. Elmsley, and Mr. G. L. Russell, for the *London & North-Western Railway Company*.

On behalf of the Company, it was contended that the contract with *Sharp* and *Welsh* was founded on personal reliance of them, and that no act of theirs could so vary or affect that contract as to enable a stranger to intervene and sue upon it,—that the contractors, whatever they might do inter se, could not, as against the company,

transfer the contract to others, or create a privity between the company and others, which the company did not accept.

It was also contended, that, as the company were not bound by the contract of February, 1847, to account to any but the contractors, so none of the subsequent acts could impose upon them any new obligation not found within the terms of the contract, as, being a corporation, they could only be bound under their common seal: *The Mayor, Alderman, and Burgesses of the Borough of Ludlow v. Charlton* (a). This principle, it was contended, was affirmed in a case much stronger than the present, in which additional works were done under the sanction of the agents of a corporation, and of which the corporation had the benefit, and yet were held not to be liable to pay for them, as, being a corporation, they could not make a new parol agreement: *Lamprell v. The Guardians of the Poor of the Billericay Union* (b). A similar principle had been admitted in equity, so far as not to allow a contract under seal to be varied by subsequent circumstances, and thereby alone to be brought within the jurisdiction of a court of equity: *Kirk v. The Guardians of the Bromley Union* (c), *Williams v. The Chester & Holyhead Railway Company* (d).

On the other side, as to the necessity of the seal of the company, *Beverley v. The Lincoln Gas Light & Coke Company* (e) was cited; and, in support of the jurisdiction of the Court to direct an account, *Nixon v. The Taff Vale Railway Company* (f).

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VICE-CHANCELLOR:—

I have in this case to consider whether such a privity *Judgment.*

(a) 6 M. & W. 815.

(b) 3 Exch. 283.

(c) 2 Phil. 640.

(d) 15 Jur. 828.

(e) 6 Ad. & El. 829.

(f) 7 Hare, 136.

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is established between the Plaintiff and the Railway Company as will enable the former to obtain any relief in this suit. I have a strong opinion on the merits in favour of the Plaintiff, if the position of the parties in respect of their legal rights, and the difficulty arising from the absence of any recognition of the Plaintiff under the seal of the company, do not preclude him from relief. I think the case chiefly depends on the effect of the assignment by *Welsh* to the Plaintiff of the monies to become due under the contract. The original contract was a joint contract, and the works were proceeded with by both contractors until the 22nd of April, 1848. An arrangement between *Welsh* and *Sharp* was then attempted, under which the partnership was to be dissolved: but it has been disputed, whether *Welsh* fully complied with the terms of that arrangement, and notice of the dissolution was never inserted in the *London Gazette*. I must come to the conclusion on the evidence that the partnership was not dissolved prior to the 10th May, 1848. On that day execution was issued against *Sharp* at the suit of a creditor. It has been argued that there was no necessity for this execution; that it must be taken as a contrivance of *Welsh*; and that I must look on the conduct of *Welsh* in this respect as fraudulent. But no step whatever has been taken by *Sharp* to impeach the validity of the execution, or to treat the conduct of *Welsh* as fraudulent, or to set aside the sale to him by the sheriff of *Sharp's* moiety of the partnership effects. I thought that an early authority had held that an execution against one partner is a dissolution of a partnership; and I find that the case is *Skipp v. Harwood* (a), which was a branch of the great case of *West v. Skipp*, which was repeatedly before Lord *Hardwicke* (b). *Harwood* and *Skipp* were in partnership as brewers. *Harwood* gave his sisters a warrant of attorney to confess judgment for securing

(a) 2 Swanst. 586.

(b) 1 Ves. sen. 239, 456.

his debt to them; the sisters entered up judgment; and the sheriff took a moiety of the partnership goods in execution: and the question to be considered was, as to the effect of that execution. Lord *Hardwicke* ultimately determined that the assignees of the other partner became entitled to have the accounts taken on the footing of the partnership articles, because the sisters had allowed their brother to remain in possession of the partnership goods after the elegit; but the point as to the dissolution is fully considered, and Lord *Hardwicke* said, "The share taken in execution was liable, in the first place, to all such demands as the other partner had against *Harwood* on the partnership account, either at law or in equity, antecedent to the execution, but not to such demands as he might have on a separate account, nor to such as were subsequent to the execution; because, as to the goods taken in execution, the partnership ended thereupon, and the creditor became a tenant in common with the other partner." That is the important part of Lord *Hardwicke's* judgment to which I refer for the present purpose: but the principle I think goes further. The partnership ends, not only as to the particular goods taken in execution, but it must end altogether. The other partner has a right to have the business carried on with the goods and effects which the co-partnership has provided for that purpose; and the only mode in which the value of the share of the goods seized can be ascertained is by a sale: but the goods cannot be carried away without the accounts being taken, and the equities between the partners settled; and the execution is therefore quite inconsistent with the continuance of the partnership. The notions of the effect of an execution on the contract of partnership were somewhat unsettled in 1747. The Vice-Chancellor *Knight Bruce*, in the late case of *Habershon v. Blurton* (a), followed the principle indicated by Lord *Eldon* in *Waters v. Taylor* (b), and held clearly

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(a) De G. & S. 121.

(b) 2 V. & B. 301.

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that the execution and assignment by the sheriff effected a dissolution of the partnership; but he directed an inquiry as to the effects and liabilities existing at the time of the dissolution, and what had been subsequently received and paid in respect of the debts and liabilities up to that time. The inquiry proceeded entirely upon the principle that all the outgoing partner could retain of interest in the concern must be such interest up to and not after the time of the dissolution. The clear result in this case is, that, as between *Sharp* and *Welsh*, the partnership was dissolved on the 10th of May, 1848.

After the dissolution it appears that these circumstances occurred,—*Welsh* gave the company notice of the assignment, and that he was solely entitled to the benefit of the contract. The directors of the company had a meeting, and agreed that *Welsh* should go on with the works and receive payment, the company having an indemnity against any claim by *Sharp*; and *Welsh* was allowed to proceed alone in the execution of the work. *Sharp* does not appear again on the scene, except that there is some evidence that one day he came and gave some orders, when he was turned off the works by force; but there is nothing to shew that he ever after the dissolution took any active part in the prosecution of the works, or that he ever subsequently brought any labour, money, or effects to be employed in the execution of the contract. All that was done after the dissolution was done by *Welsh* alone; and for all such works *Welsh* alone was the party to be paid. My impression certainly is, that no new contract whatever has been entered into by the company with *Welsh* or with the Plaintiff; and therefore the question, how far the company can be bound by a contract not under seal, does not arise. The company has never released the contractors or their sureties from the performance of the contract, nor have they ever sought to be released. It is quite consistent with the contract, that, after

the partnership was dissolved, the company should continue to employ one of the two contractors, and that they should be bound to pay him for the work done. In *Thacker v. Shepherd*(a), a case at Nisi Prius, it was decided that money paid to Defendant's use by a solvent partner out of his separate property, after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. That case is analogous to the present. Here, after the dissolution, the parties become tenants in common, and the partner who in pursuance of the joint contract solely does the work, might at law sue alone and in his own name. In the case to which I have referred, it was argued that the demand was on a joint contract; but the Court said "the action is for money paid by Plaintiff for Defendant's use. The money was not paid till a year after the bankruptcy of Plaintiff's partner. It was not paid out of the partnership effects, but out of the separate estate of the Plaintiff." So, in this case, *Welsh* might sue for all work done since the 10th of May, 1848; at all events, in equity he would be entitled to be paid for all that he had done separately after that date.

On the 25th of May, *Welsh* assigned to the Plaintiff the benefit of the contract. Upon the effect of that transaction much doubt might certainly arise. It might be contended that he could not transfer the contract to another party without the consent in writing of the company. Into this question, however, it is not necessary for me to enter. I do not understand it to be put that the company consented to the assignment in the sense of thereby releasing the original contractors from any of their obligations. One effect of the assignment at least was to transfer to the Plaintiff the right to all monies become due to *Welsh* in respect of

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(a) 2 Chit. Rep. 652.

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works done before, and also to become due in respect of works done after the dissolution. How far this might, if the dissolution had not occurred, have affected a debtor to the partnership or to the particular contractor,—whether the company might not still be entitled to say that they would have no dealing with the party taking under the assignment, but would settle with the parties who had contracted with them,—or how the case may have stood as to the interest of *Welsh* alone, it is not necessary for me to say. The assignment to the Plaintiff in this case clearly gives him a claim to some relief; and the question then is, to what extent he is entitled to relief.

I have never doubted that the release which the company have obtained from *Sharp* cannot stand against *Welsh* or the Plaintiff. It was urged by the Solicitor-General that the company was morally justified in taking a release from *Sharp*, because, as he contends, the name of *Sharp* had been improperly used in the action, by which he would be unjustly exposed to liability. I fear, that, in the circumstances of the case, I cannot give the company credit for having acted out of regard and compassion to the interests of *Sharp*. The evidence of what took place at interviews between the parties is contradictory, but the facts which appear on the written documents are subject to no question. It appears, that, on the 8th of June, 1849, *Sharp* wrote a letter to the directors of the company, drawing their attention to the work which he stated that he had done, and asking for payment, and at the same time informing the company, that, in consequence of the insolvency of *Welsh*, they could not be justified in paying any portion of the amount due to any other person than himself; yet the company, instead of accepting this letter as discharging them from the necessity of making any further payments to *Welsh*, actually, on the 7th of July following, paid the Plaintiff 1,249*l.*; and they pay such slight regard to the

remonstrances of *Sharp*, that the receipt is taken as for a payment made on account of *Welsh*. It is plain that the company were content to allow *Welsh* to go on with the works, and to pay the monies which from time to time became due to *Welsh*, or to the Plaintiff as representing *Sharp* and *Welsh*, the contractors;—the money being sometimes paid to the Plaintiff directly. When, however, the action is commenced against them by the Plaintiff, the company for the first time allow themselves to be brought into communication with *Sharp*, and settle an account with him, without any investigation as to the amount of works done by the Plaintiff and *Welsh* since the 10th of May, 1848, during which time *Sharp* had done nothing.

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It is impossible that a release taken in such a manner can be sustained. I should not need any authority for my decision on that point, but there are authorities applicable to such a case, even at law. The Courts of law may not have power to set aside a release; but, that, in such a case, they would not hesitate to prevent the Defendant from pleading the release, is plain from the cases of *Phillips v. Clagett* (a), and *Barker v. Richardson* (b), in which latter case, a release given in circumstances in many respects substantially the same as those now before me, was not allowed to be set up. In this case, there is no reason to doubt that the company had throughout, and at the time of taking the release, full knowledge of the respective positions of *Sharp* and *Welsh*, and of the Plaintiff, with regard to the contract and the works which have been done in its execution.

The Plaintiff is entitled to a declaration of the Court that the partnership between *Welsh* and *Sharp*, as co-contractors, under the indenture of the 1st of February, 1847,

(a) 11 M. & W. 84. See *Williams v. Roberts*, 8 Hare, 315; and *Dunn v. Cox*, 11 Hare, 61. (b) 1 Y. & J. 362.

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ceased and determined on the 10th of May, 1848, when execution was levied on the moiety of *Sharp* in the goods, chattels, and effects of the said partnership; and that *Welsh*, having been permitted by the Defendants, the *London and North-Western Railway Company*, to complete the said contract by himself and his agents, became entitled to receive all monies that should become due and payable in respect of works done under the said contract, from and after the said 10th of May; and that the Plaintiff became entitled, under the indenture of assignment of the 25th of May, 1848, to the share and interest of *Welsh* in all monies then due to *Welsh* in respect of works executed under and in pursuance of the said contract prior to the 10th of May, 1848, and to all monies due or to become due to *Welsh* in respect of works executed under and pursuant to the said contract subsequently to the said 10th of May, 1848; and that, as between the Plaintiff and the Defendants, the *London and North-Western Railway Company*, the Plaintiff became entitled to receive all monies that were payable to *Welsh* after the 25th of August, 1848, when the Plaintiff gave notice to the said Defendants of the assignment of the 25th of May, 1848; and that the release of the 15th of February, 1850, obtained by the Defendants, the *London and North-Western Railway Company*, from the Defendant *Sharp*, is void as against the Plaintiff and the Defendants, the assignees of *Welsh*. I also direct an account of all monies which have become due and payable by the Defendants, the *London and North-Western Railway Company*, in respect of works executed under or pursuant to the said contract, and for interest thereon pursuant to the said contract, distinguishing in such account the amount due for works done prior to the 10th of May, 1848, from the works done subsequently; and also an account of all payments made by the Defendants, the *London and North-Western Railway Company*, in respect of works executed under or in pur-

suance of the said contract, distinguishing in like manner the payments made in respect of works executed prior to the 10th May, 1848, from the payments made in respect of works executed subsequently, and stating to whom, and when, and on whose receipt, all such payments respectively were made; and an inquiry whether any and what monies were on the 10th of May, 1848, due to or from the Defendant, *Sharp*, on a balance of account between him and *Welsh*, as co-partners, in respect of the said contract; and that all accounts necessary for such inquiry be taken. The costs will be reserved, and there will be liberty to any party to apply.

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THE bill was filed by a holder of 236 shares of the third series in the Union Bank of *Australia*, on behalf of himself and all other holders of similar shares, complaining that the principle upon which the profits of the company had been and were about to be distributed was erroneous, and that the proportions in which certain reserved or purchased shares of the company were proposed to be distributed amongst the several series of shareholders were also erroneous and unjust.

The Union Bank of *Australia* was formed in 1837, and 20,000 25*l.* shares were then subscribed for, and subsequently paid up. In 1839, the bank increased its capital by the addition of 12,000 other 25*l.* shares, which were also subscribed for and paid up. In 1841, the company resolved to increase the capital to 1,000,000*l.*; and for that purpose

Jan. 20th.

Construction of the deed of association of a joint-stock banking company, composed of shareholders whose shares had been created at different times, and upon some of which the amount of the shares had, and upon others had not been required to be paid up,—as governing the rights of such several classes of shareholders, with reference to a provision enabling the directors to

declare a dividend out of the profits, “and to apply such dividend either as a bonus to be added to the respective shares, or as interest or dividend upon shares, or upon the amount paid up in respect of such shares, or as part bonus and part interest, or dividend, or otherwise, as they may deem most expedient, and to divide such dividend or bonus into as many equal parts as there shall be shares then held in the capital of the Company.”

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created 8000 other 25*l.* shares, upon which 2*l.* 10*s.* per share was paid in January, 1842. Upon the latter shares no further calls had ever been made. The bank had from time to time declared dividends of 6 per cent., and bonuses which had varied, and been at times 2*l.*, 3*l.*, and 4*l.*, which had been added to the 6*l.* per cent. These payments had been always calculated on the paid-up capital of the company, and, consequently, the holders of the shares of the third series had only received for each share 1-10th of the sum received by the holders of the shares of the first two series. In the years 1847 and 1848, when the shares of the company, as well as that of other banking and trading companies, were greatly depressed, the directors, by the authority of the company, purchased about 5000 shares. The greater portion of those shares had been since sold, and the remainder, it was resolved, by a resolution of July, 1852, to offer to the shareholders of the company at the price of 42*l.* for the paid up shares, and 4*l.* 4*s.* for the third class of shares, according to the proportion of the stock of the company held by the proprietors respectively. The profits of the company had subsequently increased, and a divisible profit of 12*l.* per cent., either in the shape of dividend, of interest, or of bonus, was about to be declared. The Plaintiff now insisted that the circumstance that the company had not thought proper to call for more than 2*l.* 10*s.* on each of his shares was unimportant, and that he was entitled to an equal dividend on his shares (subject to interest being allowed on the capital advanced) with the holders of shares of the first and second series. He also demanded, that, in the distribution of the reserved or purchased shares, he should be allowed the proportion to which the number of his shares entitled him. On this principle he claimed eighteen of the shares; but the directors had awarded him two only.

The clauses in the deed of association which were chiefly

referred to in the argument and the judgment, were the 33rd and the 107th. The 33rd clause was as follows:—
 “That it shall be lawful for the Board of Directors, subject to the provision next hereinafter contained, to declare a dividend from time to time out of the profits of the company, to be calculated on a statement to be laid before the proprietors at the annual general meeting as hereinafter provided, and that it shall be optional with the said board to apply such dividend either as a bonus to be added to the respective shares, or as interest or dividend upon such shares, or upon the amount paid up in respect of such shares, or as part bonus and part interest or dividend, or otherwise, as they may deem most expedient, and to divide such dividend or bonus into as many equal parts as there shall be shares then held in the capital of the company.”
 The 107th was, “That every proprietor of the company, his or her heirs, executors, administrators, and assigns, as between him, her, and them, and the other proprietors, and their respective heirs, executors, administrators, and assigns, shall be answerable and liable for or in respect of the debts, liabilities and demands of or upon the company, in proportion to his or her share or interest for the time being in the said company, and not further or otherwise.”

A motion was now made on behalf of the Plaintiff on the record and the holders of other like shares, for an injunction to restrain the directors from making or declaring any division of the profits of the company among the proprietors of shares in the company otherwise than in proportion to the number of shares held by the proprietors respectively; and to restrain them also from transferring or causing to be transferred the reserved shares in the company among the proprietors of shares, otherwise than in proportion to the number of shares in the company held by such proprietors respectively.

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Mr. *Rolt* and Mr. *Speed* in support of the motion, contended, that, upon the ordinary rule affecting all partnerships, each partner, in the absence of any special provision to the contrary, was entitled to share equally in the profits, as he was liable equally to the losses. The Plaintiff and the other subscribers to the third series were, in fact, holders of shares of 25*l.*, the same amount as the other shares. If their share of the capital had not been required, it was a matter purely within the discretion of the directors. They might have called for it if the money had been necessary. They had done right not to call for it, if it was not necessary. The shareholders who had paid the full amount might with propriety be allowed interest on their capital before the calculation of the surplus profits, but they could be entitled to no greater benefit than the third series of shareholders in other respects.

The deed of association, by treating the shares as integral things, affirmed the operation of the general principle on which the Plaintiff relied.

The *Solicitor-General* and Mr. *Selwyn* for the Defendants, the directors of the company, submitted, that the application was utterly unreasonable, and the argument in its support without foundation. It would be regarded as incredible by any banker of the city of *London* that the Court had been occupied for hours in the discussion of the question whether the shareholder of a banking company who had contributed 2*l.* 10*s.* was entitled to the same share of the profits as he who had contributed 25*l.* The proposition insisted upon by the counsel for the Plaintiff was no less than this:—That, whereas the shareholders who had paid up their shares were entitled only to 12 per cent. on their capital, the shareholders of the third series were entitled to 115 per cent. on their proportion of the same capital. The profits to be distributed were about 12 per

cent.; that would be 60s. on a 25l. share. The Plaintiff says, "I claim 60s. as a dividend on my 2l. 10s., but I am willing to pay you 5l. per cent. interest on the 22l. 10s. which I have yet to pay; that will amount to 22s. 6d., which being deducted from the 60s. leaves me entitled to 1l. 17s. 6d." There was nothing in the language of the deed which justified any such claim. It was, moreover, opposed to the practice of the company ever since its constitution. The Plaintiff, and all other shareholders of his class, had attended the general meetings of the company, had approved of the principle and mode of distribution of its profits, and had received their proportion of those profits on that footing. The Plaintiff had, in fact, purchased his shares in the market on the footing that they were entitled to no more of the profits than, according to the usage and practice of the company, had always been paid in respect of those shares. Even if the provisions of the deed had been (as they were not) in the Plaintiff's favour, still the continued usage and practice of the company in dividing the profits according to the paid-up capital was sufficient to abrogate that provision. This rule was applied to all partnership contracts, and a contrary rule would be obviously most unjust. With regard to the distribution of the reserved shares, the matter was clearly within the powers and discretion of the general meeting; and the general meeting, and not that Court, should have been appealed to on that subject. They insisted, that, on all these grounds, and especially in the case of an attempt to interfere with the habitual course of the company after it had been pursued without question for ten years, the motion should be refused with costs.

Mr. *Russell* and Mr. *Hobhouse*, for two Defendants who were holders of shares of the first and second series, and were made parties as representing those classes, and who had no shares of the third series, argued that the amount

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which each proprietor had contributed, was, in fact, his share. There was nothing in the word "share" to entitle the Plaintiff to equality in the distribution of the profits without regard to what he had contributed. It was true the shareholders were all equally liable to third persons; but, as among themselves, if losses occurred, the shareholder who had paid 2*l.* 10*s.* only would not be charged with more than one-tenth of the amount with which the contributor of 25*l.* would be charged; and, this being so, he was entitled to profits only in the same proportion.

The following cases were referred to on different branches of the argument:—*Lord v. The Governor and Company of the Copper Miners* (a), *Const v. Harris* (b), *Carlisle v. South-Eastern Railway Company* (c), *Richardson v. Larpent* (d).

At the conclusion of the argument, the Vice-Chancellor inquired whether the parties would consent that the case, with the affidavits now before the Court, or with further affidavits, should be treated as a motion for a decree?

Mr. *Rolt*, for the Plaintiff, said he was willing to consent to that course; but no assent to it was given by the Defendants.

Judgment. VICE-CHANCELLOR:—

I shall not delay giving my judgment in this case. I have been able during the day to consider the argument of the learned counsel on both sides, and I think it is desirable that I should give my opinion at once.

(a) 2 Phil. 740.
 (b) T. & R. 496.

(c) 1 M'N. & G. 689.
 (d) 2 Y. & C. C. C. 507.

This is not so clear a case on the part of the Defendants as I had at first thought, nor as the necessary result of this application would perhaps make it appear to be. It was said, on the part of the Defendants, that it is almost an absurdity, and would be so considered in the city, if the people there were to be told that a case was argued for several hours in a court of justice, in order to ascertain whether one party, who had contributed 2*l.* 10*s.* towards a mercantile speculation, was to receive a share of the profits of an equal amount to another partner who had contributed 22*l.* 10*s.* more towards the same speculation. It does not appear to me that this case can be reduced to that state of things. I concur to a great extent in the argument for the Plaintiff; and I think it is clear, that, looking to the deed, the capital was to be divided into shares, that there was to be a certain number of original shares of 25*l.* each, and that an increase of capital might be made by issuing new shares, not to any specified amount, but an increase which might have been carried on to the extent of a million. The 114th section seems to have provided, with some degree of care, that the shares should not be formed in fractional parts. Looking, therefore, to the whole of the deed, it seems evident that the company was not formed upon the principle that many joint-stock companies are, and that they could not, as railway companies have thought they can, divide their shares. It was not a company of that description. The capital was to be held in definite shares, except that the increased capital was not necessarily to be issued according to any given amount of shares. In accordance with this power, additional shares were issued by the company in 1841, and also at the beginning of 1842. In each of those cases the company provided that the shares should be of the same amount, viz. 25*l.* each; and they provided in the last instance that the capital of the company should be one million in the whole. Therefore, it is clear that the result of the whole proceeding on the part of the company has

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been to create a share capital, a capital to be allotted in definite shares of 25*l.* each, of which there were to be no fractional parts, and that every person holding one of such shares was to be admitted as a shareholder to the extent of his share, and, as was admitted by the Solicitor-General, to every personal privilege,—that of voting, and so on,—conferred by the deed, except as to the dividends.

In the course of the argument, I put this case:—Suppose two parties, *A.* and *B.*, agree to enter into partnership, with a capital of 10,000*l.*, and to advance that capital in equal shares; but, as regards *B.*, he is told that he need not pay up his share of the capital until after so many days notice:—would any one doubt, that, under such a partnership agreement, each would be entitled to receive his dividend in equality, although his capital was not paid up? *B.*, not having paid a single farthing, while his partner had paid the whole of his 5000*l.*, would be a partner equally entitled and liable to participate in profit and loss. I cannot distinguish that case from this. Here we have a capital of a million, divided into so many shares. A purchaser of a number of shares may say that he has embarked in a concern of which half the capital only is paid up, and that he is told that the concern does not want it all, and that he can only be called upon to pay on certain stipulated days and times. That would be a state of things wholly independent of any provision in the deed, except as regards profit and loss; but, when we come to the provision of the deed as regards the loss, I think that the 107th section is sufficiently explicit, when it says that the shareholder shall be a partner to the extent of his share or interest in the concern. When, however, the question is one of profit, it is urged that he is to be considered as a partner only to the extent of the capital he has paid up. I cannot agree to that argument. The shareholder is interested to the extent of his share in the capital; and that is 25*l.* He has become a shareholder in

the capital to a given amount, and he is interested in that capital to that extent. The word "Share" implies, or seems to me to imply, 25*l.*, and I cannot think that it implies anything else. For every share that he holds, he is interested to that extent, whether he has paid the whole of the calls or not. His liability under the deed is neither more nor less than that amount; and I think his interest is co-extensive. He may be liable to forfeit the shares if he fails to pay up his calls; but he is not the less a shareholder for that reason, or because the company has not thought it necessary to call upon him to pay up the amount of his shares. So far I agree with the Plaintiff in his argument; and I certainly should have expected, *prima facie*, that the party would have taken an equal share in the profits who thus might be called upon to bear an equal share in the losses. I should have expected this if there had been nothing in the deed; but, finding a provision in the deed as to loss, I think so much more strongly.

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I confess, that, in the outset, my opinion was that the question might be determined by the 33rd clause of the deed, or by such lights as might be gained from other clauses. With regard to this clause, a difficulty arose in my mind; and, until I heard the argument on the other side, I did not feel the full force of some parts of the clause upon the contract which the parties have entered into. Mr. *Rolt* says, that, looking at the previous grounds on which the case is put, and upon which I have expressed my agreement with him, the Court will not be disposed to deprive the party of the benefit of paying up his shares in full, unless it is imperatively called upon by the terms of the clause to do so; I shall not shrink from giving my opinion upon that clause, although the view I entertain of it may have to undergo revision when the cause comes on for hearing, and other facts and circumstances are brought to light which may have a bearing on the case. As I am driven to a decision

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upon the 33rd clause, I must say that I cannot come to a decision upon it in favour of the Plaintiff

I admit there is a great deal in favour of the view the Plaintiff has taken as to the unreasonableness of a party being subjected to share the loss, while at the same time he is not to be entitled to an equal participation in the profits; but, on the other hand, there is some degree of unreasonableness in the contrary conclusion. I did not feel it so strongly as it was pressed upon me, and for the reason I have already stated,—that a party who had entered into such a contract should participate in the profits to the full extent of his 25*l.* share; but I find that the Plaintiff says this:—"I entered into this contract, though I knew of this 33rd clause. Whatever may be its construction, I am content to place myself in this position,—that I am not to be in a condition to force the acceptance of my capital upon the company. I will allow the directors to say whether or not the whole of my capital shall be paid up. I agree to be placed in such a position that I may never be to all intents and purposes a holder entitled to profits on my full share,—supposing that to be the construction of the 33rd clause of the deed. I am content to put myself in that position, although I may, in case of misfortune, be liable to the whole loss." Now, one certainly requires strong evidence, on the face of it, that that is the meaning of the deed, before one can arrive at that conclusion; though, at the same time, it is not so extraordinary a contract for a man to enter into as the Plaintiff's argument suggests. He may say, "I know that I am going into the market to buy shares. I know that I shall not be called upon to pay them up without a certain number of months' notice; and I know that I can never be called upon to pay them up without that notice; and I think that is an advantage which will counterpoise to me for the disadvantage of being subjected to contribute to the whole losses of the concern." It is not, therefore, an agreement so unreason-

able that the Court must be driven to say, that it can have no other interpretation than that put upon it by the Plaintiff.

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In coming to this third class of shareholders, the great difficulty which Mr. *Rolt* appears to have had to deal with, is the clause which enables so much of the capital to remain unpaid, and which provides for the payment of interest on the capital. He is not able to fix the rate of interest, and he says, I am bound to take the common meaning of the term "interest," and that it means the legal interest of 5*l.* per cent. Now, I find a clause in the deed which says that parties who advance capital are to be paid interest at the rate of 5*l.* per cent.; but, except for this circumstance, there is nothing in the deed to induce the Court to suppose that the interest was to be fixed at 5*l.* per cent.; and, looking at that fact, and also to the fact that this bank was an undertaking whose affairs were to be carried on in *Australia* (where the rate of interest is very high), it is not clear that the interest was limited to any amount; and, if it were, it would certainly not be limited to any such amount as the legal rate of interest in this country.

There is much difficulty running through the construction of the clause suggested on behalf of the Plaintiff. It stands thus:—First, the directors are to take the dividend out of the profits. I think that the words 'dividend' and 'profit,' cannot be used here in the ordinary mercantile sense of interest on capital; neither can they well be used to signify the ordinary rate of interest on capital, because it is the well-known practice of every mercantile firm, I believe, to make a deduction for interest before they estimate their profits. Now, all such advances, I agree, were made to the company by way of loans, for, all those sums might be recalled by the parties advancing them. All these matters would, therefore, be disposed of before we come to the 33rd clause of the deed;

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and this 33rd clause must refer to what the actual profits were, after paying all interest of this kind, and the other engagements and liabilities of the company. The directors are to make out a statement of the profits, and declare a dividend, and then it is said it shall be optional with the board to apply such dividend. Here it is that the word "dividend" appears to be used in two senses: they are to declare a "dividend," and therefore I think "dividend" here must mean the entire gross sum applicable to dividend. They are to apply such dividend, either as a bonus to be added to the capital of, or as dividend or interest on, their respective shares. Thus, we have a three-fold division;—it is to be "bonus," or "interest," or "dividend," on the shares; and then comes this alternative, "or upon the amount paid up in respect of such shares." And upon this arises nearly the whole question.

It is clear the 33rd section looks forward to the possible increase of the amount of capital. The increase was to be made within such time, and in such manner of payment as should be thought requisite; but no call was to be made in respect of such increase of capital, except by the authority of a general meeting; and the board of Directors were to be authorised by a general meeting to make such calls when required. The new state of circumstances, therefore, is clearly contemplated by the deed, in which new shares may be created when the old shares have been entirely paid up; for, it is not probable that the company would invite new capital until they had called on all the old shareholders to pay the full amount on their shares. It is thus, I think, evidently contemplated that new capital will be created, and that the calls will be made from time to time in such a manner as a meeting of proprietors shall think fit. It appears to me that the interest or dividend which is authorised to be paid according to the provisions of clause 33, must be interest on the amount paid up. The

only alternative would be, that it might be supposed that all persons who were under equal obligations to pay their calls would pay alike, and that none would pay more than they were obliged to pay. But I apprehend there were other modes of dealing with those who had not paid up the calls on their shares, as by forfeiture of the shares, or declaring that the holders were not to have the privileges of shareholders until the whole should be paid up. As to the suggestion made, that this paying up was by way of advance, and that the payments could only be treated as loans, I do not think that this clause has any reference to that state of things, and that the only state of things to which the clause can have reference is that which has really occurred,—there being parties who had not paid up their shares in full. Now, there being these three things, bonus on shares, or interest on capital, or dividend in respect of shares, the clause goes on to say, the directors are to have the option to apply the gross amount of profits in any one of these three ways, or any two of the ways specified, namely part in payment of a bonus, and part in payment of interest or dividend upon the shares: that is to say, bonus paid upon the capital, or (for it comprehends the two) as dividend upon the shares or as interest upon the capital; and those things are put properly in antithesis; for a bonus would be something put to the credit of the party in the books of the company, whilst the other would be something he could put in his pocket, and take away, and which would never appear in the books of the company.

There is, then, the last part of the clause, upon which the Plaintiff has strongly relied. The last portion of the clause gives the directors power to divide the dividend or bonus, "into as many equal parts as there shall be shares then held in the capital of the company." Now, when you come to that part of the clause, you find that the word "interest" is omitted, and there appears to be a good reason for omit-

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ting it. The interest was to be in proportion to the capital, and therefore it could not be divided into equal shares; but with regard to the bonus or dividend, that was to be according to the shares that every man held, and not according to the capital; therefore, that must be divided into equal portions. The directors have an option to pay interest upon the amount of the capital paid up. Now, how can I confine that to 5 or 6 or 10 per cent., or to any given amount? Under this clause of the deed you chose to contract for a certain number of shares, and to take those shares, and render yourself liable for the whole of the loss, and that you are only to contribute a certain amount of capital, and only to take interest on the amount that you pay up. You also contract that you shall not have power or liability to advance more capital, except when the company shall call for it. It may be a hard case, and rather an unreasonable contract, yet it is one upon which, if I am called upon to give an opinion, it is, that, on the question now raised, the Plaintiff must have judgment against him.

In argument on behalf of the first and second series of shareholders, it was asked, what inducement would the directors have to leave the Plaintiff with any portion of his shares unpaid; because, if he had a right to claim his dividend per share, instead of as interest on the amount of capital, then of course the directors would immediately see that it was beneficial and desirable that the whole amount should be paid up; and it was said, that the provision giving the shareholders the option of paying up more if they chose to do so, getting interest at 5*l.* per cent. would be absurd, if that were the effect of the clause. I think that observation has a considerable bearing on the question, and strengthens the construction that I must put upon the 33rd clause,—that it does not entitle the Plaintiff to the relief which he claims by his bill.

Although this is my construction of the deed, at the same time, I should add, that this being an interlocutory injunction, there are other reasons that would have operated with me to induce me to refuse the injunction, if, entertaining a different opinion, I had still thought that I could not arrive at a conclusion on the 33rd clause very plain and decisive in favour of the Plaintiff. I do not think that this would be a proper case for the Court to interfere by way of injunction, when the consequence would be, that the parties would be deprived, on Monday next, the 24th of January, of their dividends. The bill was only filed two days ago, the Plaintiff being a stockbroker, and necessarily acquainted with all these circumstances, and having for years past received the dividend on his capital in this way. I must take him to be a person who must have known what were the provisions of the deed before he executed it. He has received his dividend in the same manner for the last ten years; and, though as long ago as last July his attention was called to the matter, yet he waits until within four days of the dividend being paid before he does anything, instead of at once filing a bill and getting a decree, as he might have done weeks ago. In deciding upon this application, I should have to balance the possibility of the inconvenience to the Plaintiff of his losing this dividend against the inconvenience to all the other parties who have been in the habit of receiving their dividend regularly in this way for several years. I think that, of the two inconveniences, the one bears no proportion to the other, and that I ought not to issue an injunction at this stage of the proceedings, even although the Defendants decline (and I do not know that they are bound to do otherwise) to treat this as a motion for a decree.

I have given my judgment as speedily as possible, in order that the parties, if they think proper, may at once carry the case further; and I think it right to observe, that,

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so far from thinking that the case is in favour of the Plaintiff, the balance of my opinion is the other way, and I feel bound to refuse the injunction.

This is not a case in which I can in the least proceed upon the suggestion that the subsequent dealings between the parties have altered the effect of the deed. It is not a case in which the parties can be said to have waived any special advantages or provisions in the deed; and, had I found the deed in the Plaintiff's favour, I should not have hesitated to give him the relief he asks. The injunction therefore must be refused. With regard to the costs, that question must be reserved till the hearing of the cause.

July 14th.

FISHER v. BALDWIN.

The Court, on a bill for an account of transactions under a contract, and for an injunction, refused to restrain execution on a judgment for costs of an action at law, which the Plaintiff had brought against the Defendant, to recover monies alleged to be due under the same contract, and in which action there was a verdict for the Defendant.

THE bill stated the following case:—

The Plaintiff was foreman and cutter to the Defendants, who were tailors, carrying on business in *Cornhill*, and had agreed to allow him 1½l. per cent. on the gross amount of business done at their establishment; which amount they afterwards (without his consent or knowledge) reduced, by a direction to their accountant to apportion the per-centage between him and two other persons in their employ. The sum apportioned to the Plaintiff, on the 1st of January, 1848, in respect of the reduced per-centage, was carried to the Plaintiff's credit in a ledger containing lists of the trade debts, and was entered as a debt due to the Plaintiff on that day as follows: "*John Fisher*, due to him, 87l. 5s. 4d.;" and the same still remained unpaid.

Cross demands are not alone a sufficient foundation for equitable set-off:—and whether equitable set-off is not confined to cases in which the equity of the bill impeaches the title to the legal demand—*quære*.

In February, 1853, the Plaintiff was dismissed from the employ of the Defendants; and, in Easter Term following, he brought an action against them to recover, among other things, the monies due to him on account of his per-centage; and the ledger with the entry of 87*l.* 5*s.* 4*d.* was produced in evidence; but a verdict was found for the Defendants, and their costs of the action were taxed at 51*l.* 10*s.* 4*d.*, for which judgment was, on the 25th of June, 1853, entered up against the Plaintiff. The bill alleged, that it was admitted on the part of the Defendants at the trial, that the 87*l.* 5*s.* 4*d.* was the amount due to the Plaintiff at that date; and it charged, that the Plaintiff was entitled to set-off against the judgment-debt of 51*l.* 10*s.* 4*d.* the said 87*l.* 5*s.* 4*d.*; and the bill prayed an injunction to restrain execution against the Plaintiff under the judgment; and also that an account might be taken of what was due to him from the Defendants in respect of his alleged per-centage, on the footing of the arrangement of January, 1848.

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Mr. *Prendergast* moved *ex parte* for an injunction to restrain execution under the judgment of June, 1853.

Argument.

The VICE-CHANCELLOR referred to the case of *Rawson v. Samuel* (a), in which Lord *Cottenham* explained the cases on equitable set-off as having been cases in which "the equity of the bill impeached the title to the legal demand" (b), and not cases like that in which the injunction was now asked for, in which, although it might be said, that the subjects of the suit and of the action at law remotely arose out of the same contract, yet one was for an

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(a) Cr. & Ph. 161.

(b) Id. 179.

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account of transactions under the contract, and the other for costs which the Plaintiff had incurred in an attempt to enforce the contract by proceedings in which he had miscarried. Costs awarded against a party to a suit were in the nature of damages, and brought the case within the observation of Lord *Cottenham*, "Is there any equity in preventing a party, who has recovered damages at law, from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered" (a)? It was clear, that the Court would not, in such a case, rely on the allegation of the Plaintiff as to what the result of the account would be.

His Honour refused the application.

(a) Cr. & Ph. 179.

Feb. 16th &
 March 2nd.

FORBES v. RICHARDSON.

Where certain annuities and an annual allowance were directed to be raised out of the annual rents and profits of an estate, and paid and applied for the uses of the daughters of the testator, and the surplus of the said rents and profits to be accumulated for twenty-one years, or until sums of 40,000*l.* and 100,000*l.* should be raised and invested, when the annuities and allowance should cease:—it was *held*, that the annuities and allowance were not charges on the corpus of the estate; but that the arrears of such annuities and allowance, which the rents and profits during the twenty-one years had been insufficient to pay, ought to be raised and paid out of the rents and profits accruing after the expiration of the twenty-one years.

THE testator, *James Wilson*, by his will, dated in August, 1830, devised his manor of *Sneaton*, and his mansion-house, called *Sneaton Castle*, and all his real estate in *Yorkshire*, together with his sugar estates in the Isle of *St. Vincent*, and the slaves and stock thereon, and all the rest of his real estate, to trustees, upon trust, out of the annual rents, issues, and profits, to pay his debts and funeral and testamentary expenses; and subject thereto, out of the same rents, issues, and profits, to levy, raise, and pay

the several annuities or yearly sums therein mentioned; and upon further trust, to permit and suffer his four daughters, or such of them as should be unmarried, to occupy his said mansion of *Sneaton Castle* rent free; and during such residence, by and out of the rents and profits of his said estates, to levy and raise the clear annual sum of 1000*l.*, and apply the same equally for the maintenance of his said unmarried daughters residing in his said mansion, or for the expenses of their establishment; and upon further trust, by and out of the annual rents and profits of his said estates, to levy and raise for each of his said daughters during her life, in addition to her share of the said sum of 1000*l.*, the clear annual sum of 200*l.*, for the absolute use of his said daughters, if unmarried, and if married, then to their separate use respectively. The testator then directed his said trustees to accumulate the surplus annual rents, issues, and profits of the said estates until the same, with the accumulations of the personal estate, should amount to 40,000*l.*, or until the expiration of twenty-one years from his death, when he directed that the interest of the sum so accumulated should be paid to his daughters in lieu of their several annuities of 200*l.*, which were then to cease. And the testator further directed his said trustees to continue to accumulate the surplus rents, issues, and profits of the said estates until they should amount to the further sum of 100,000*l.*, or until the expiration of twenty-one years from his death, when he directed that the provisions thereinbefore contained as to the residence of his said daughters in *Sneaton Castle*, and as to the said castle allowance, should cease and determine. And the testator devised his said real estates, subject to the said trusts, to his said daughters, to the uses therein mentioned; and he directed, that the said sum of 100,000*l.* should be laid out in the purchase of lands to be settled to the uses therein mentioned. The testator then bequeathed his residuary and personal estate to his said trustees, upon trust, to sell and get in the same

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and stand possessed of the proceeds, to pay his debts, funeral, and testamentary expenses, and any legacies given by his will, and to accumulate the surplus in manner aforesaid.

The testator died in September, 1830.

The suit was instituted by the trustees in 1831, and a receiver had been appointed, and various orders made in the cause. The personal estate and the rents and profits of the real estate had been applied in payment of the debts and charges on the property, and, so far as they would extend, towards the payment of the annuities and the castle allowance of 1000*l.* a-year, but they were insufficient for the purposes, and very large arrears remained due both in respect of the annuities and the allowance.

The twenty-one years appointed for the period of accumulation expired in September, 1851; and on the cause coming on for further directions, the questions chiefly discussed were, whether the annuities and castle allowance ought to be raised and paid out of the capital of the property? and if not, whether they would altogether cease at the termination of the twenty-one years, or should be satisfied from the rents and profits of succeeding years?

Argument.

Mr. C. P. Cooper, Mr. Walker, Mr. Loftus Wigram, Mr. Follett, Mr. Hislop Clarke, Mr. Selwyn, Mr. Cotton, Mr. Morris, and Mr. Nicholson appeared for the several parties.

In addition to the cases mentioned in the judgment, *Picard v. Mitchell* (a), and *Miller v. Huddleston* (b) were cited.

(a) 14 Beav. 103.

(b) 3 M'N. & G. 513.

VICE-CHANCELLOR:—

The only points discussed in argument were, the construction of the will as to the annuities of 200*l.* given to each of the daughters of the testator, and the 1000*l.* per annum, called the castle allowance; and the question was, first, whether those sums terminate at the expiration of twenty-one years from the death of the testator; whether they are so completely extinguished and put an end to, that no relief can be afforded even as to the arrears then due; and secondly, whether those sums are charged on the annual rents and profits of the estate, or on the corpus?

The testator died on the 7th of September, 1830, having by his will directed the accumulation of certain surplus rents till they realised the sum of 40,000*l.*, at which time, or at the expiration of twenty-one years from his death, when the accumulations were to cease, he directed that the annuities of 200*l.* per annum, which he gave to each of his daughters, should cease; and when, by subsequent accumulations, the further sum of 100,000*l.* should be raised, he directed that the trust for raising the castle allowance of 1000*l.* a-year should cease. In the event, at the expiration of the twenty-one years, instead of there having been any accumulation, the annuities and allowance are greatly in arrear.

[His Honour referred to the various orders which had been made in the cause, and to the decree which had been made without prejudice to the rights of the annuitants.]

Under the several clauses of this will, the first question is, whether a trust is created for payment of the annuities out of the rents and profits, or out of the corpus of the estate. I do not find any case where a direction for payment

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out of annual rents and profits has been held to give a right against the corpus, or beyond the annual or current rents and profits. The contest, in the case of *Allan v. Backhouse* (a) and other cases of that kind, where a gross sum has been required to be raised out of rents and profits, has been on the point, whether there are indicia in the expressions or the objects sufficient to shew that the rents and profits referred to were not only the annual and current rents and profits, but the rents and profits for all time to come. Perhaps this large construction was rather stretching the meaning of the words, and so Lord *Hardwicke* seems to consider it in *Baines v. Dixon* (b), where he observes, that the Court has arrived at the construction by several gradations. In the present case, the words "annual rents and profits" are mentioned, and the castle charge is the only charge in which they do not occur; and the whole form of the will shews that the testator's object was to increase the bulk of the property, and that he had in his expectation an enormous amount of rents to be realised from the property, which would not only satisfy the annuities, but leave a surplus which would afford the means of accumulating the 40,000*l.* In such a case, to infer from the charge of debt, that the annuities were also to be charged upon the corpus, even if the word "annual" did not occur, would, I think, be carrying the construction further than in any of the previous authorities. The case of *Wroughton v. Colquhoun* (c) was cited in support of the argument for so extending the charge. In that case, the testator bequeathed an annuity of 260*l.* for the life of the annuitant, and the remaining interest of his money to other parties, and in the event of their death the principal to go to their children. The Vice-Chancellor *Knight Bruce* upon these words said, that he found the annuity given to the annuitant in words from which, if nothing had been

(a) 2 Ves. & B. 65.

(b) 1 Ves. 42.

(c) 1 De G. & S. 36.

added, she would have had a charge upon the capital; and that the subsequent expressions, from which a different intention was sought to be implied, were not sufficiently clear to control the effect of the preceding words. In *Stamper v. Pickering* (a) there could be no doubt upon the case, for the fee was given over expressly, subject to the charge of the annuity.

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There is another case which was not referred to—*Heneage v. Lord Andover* (b)—in which the question is treated strictly as one of intention. In that case, the testator devised his estates, charged with his debts, to his wife, whom he made his executrix and residuary legatee. The wife devised the estate to several persons successively for life, with remainder in tail, subject to a term of years, the trusts of which were declared to be for raising two specific sums of 500*l.* and 700*l.*, and then for raising the clear yearly sum of 1000*l.*, and paying the same as thereby directed; and, subject to these trusts, out of the residue of the rents, issues, and profits, to levy and raise all such sum and sums of money, not exceeding in the whole the sum of 8000*l.*, as should be necessary to satisfy and discharge the debts of the husband, the original testator; and she directed that the trustees should pay the residue of the net rents, issues, and profits of the premises comprised in the term unto the persons or person respectively for the time being next entitled to the reversion or remainder of the premises expectant on the term. And the testatrix directed, that, after the satisfaction of the said trusts, so far as related to the payment of the debts, if the person or persons for the time being entitled to an estate for life in the hereditaments thereby devised should be under twenty-one, the trustees should, during his or their minority, apply a certain yearly sum in the maintenance of such minor or minors, and lay out and

(a) 9 Sim. 176.

(b) 3 Y. & J. 360.

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invest the surplus in the purchase of real estates, to be settled on the same trusts as therein mentioned. That case in many points resembles that which is now before me. The testatrix contemplated the existence of a surplus, and directed it to be invested in land to be settled to the same uses; and the authorities were cited for the purpose of shewing, that, by rents and profits, the testatrix did not mean merely annual rents and profits, but that the amount of the charge should be raised by a sale. The Lord Chief Baron said, he could treat the case as one of intention only, and that the intention was manifest to make the gross sums of 500*l.*, 700*l.*, and 8000*l.* charges upon the annual rents and profits. The reasons the learned Judge states as leading him to that conclusion were,—First, that the testatrix used the words “rents and profits,” which *primâ facie* mean “annual rents and profits.” In the case before me the word “annual” is found, and the case is therefore stronger than if it were merely implied. “Secondly, the gross sums are directed to be paid in the same terms as the annuities; and, therefore, if the argument on the part of the Plaintiff were correct, the testatrix must have used the same words to express different intentions—meaning annual rents when she directs the annuities to be paid out of them, and a charge upon the corpus of the estate when she directs the gross sums to be raised out of such rents and profits” (*a*). Upon all these authorities, and looking at the will alone, I have no doubt that the charge is upon the annual rents and profits, and not upon the corpus of the estate.

[His Honour then adverted to the orders for payment, which had been made on petitions which had been presented in the cause, and held, that the Court was not, on the final disposal of the case on further directions, bound by these orders, in which there had been no declaration of

(*a*) 3 Y. & J. 371.

right, so as to preclude the construction of the will now adopted.]

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The next question was as to the arrears. It has been argued, that the arrears are altogether gone; and that the rents and profits of future years are not to be taken to make good the deficiency of those which are past. I am of opinion, that the annuitants are entitled to their annuities for the twenty-one years, and that the arrears must be paid out of the rents and profits which are still to accrue. It has in argument been conceded, that the annuitants are not confined to the rents *de anno in annum*. The castle allowance stands on a somewhat different footing, for, as to that, the word "annual" is not used; and it has been contended, that not only does the allowance cease, but the trust for raising it has also ceased. In support of this argument, the cases of *Darbon v. Rickards* (a) and *Foster v. Smith* (b) were cited. *Darbon v. Rickards* turned on the peculiar provisions and circumstances of the case. The testator gave an annuity to his daughter in law, during her widowhood, out of the rents, issues, and profits of some leasehold houses, and he directed the surplus to be invested in stock, the interest of which he gave to his wife for her life, and bequeathed the accumulated fund over to his granddaughters. No application seems to have been made during the life of the widow for the sale of the leasehold houses, in order to preserve the annuity for the daughter in law during her life or widowhood, and the lease was allowed to run out in the hands of the lessees; and after this had happened, and the widow was dead, the claim was made on behalf of the daughter in law, to have the annuity continued from the stock which had been produced by the surplus rents. The Vice-Chancellor of *England*, on this case, observed, that if

(a) 14 Sim. 537.

(b) 1 Ph. 629.

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the leasehold houses had been charged with the payment of the annuity in all events, it would have followed, that, if the rents had been insufficient to pay it in any one year, the houses must have been sold; whereas, he considered that such a sale could not have been directed, the other expressions in the will manifesting, as he thought, an intention to the contrary. *Foster v. Smith* was a case in which Lord *Lyndhurst* differed in opinion from the Vice-Chancellor *Knight Bruce* (a) on the effect of the direction to the trustees, "from and immediately after the decease of his wife," who was the annuitant, to convey the estate to the testator's sisters. The question was, whether the words "subject to the annuity" were to be implied from the expressions of the will, or whether the Court was asked to import them, which it could not do. Neither of the difficulties, which in these two cases stood in the way of providing for the arrears of the annuities, occur in the present case. I think the party entitled in remainder in this case can only take the rents subject to the payment of the arrears of the annuities and of the castle allowance.

(a) See 1 De G. & S. 37., and 2 Y. & C. C. C. 197.

THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY
v. DAWES.

March 18th.

THE Plaintiffs were by their Act, which incorporated the Companies, Lands, and Railway Clauses Consolidation Acts, 1845, authorised to purchase lands at *Highbury*, in the parish of *St. Mary, Islington*, of which the Defendant was tenant for life, and part of which the Defendant had demised to *George Sandeman* for a term of twenty-one years, from Michaelmas, 1843, at a rent of 161*l*, 10*s*.; the lessee covenanting to keep the garden and garden-ground comprised in the lease stocked, cropped, and manured according to improved methods of gardening, and not to cut down fruit or other trees thereon, and to cultivate and use the meadow and meadow land thereby demised according to the rules of good husbandry, and not to erect any building on the lands or garden ground thereby demised, or do any act to the nuisance or annoyance of the Defendant or his assigns, or the person or persons for the time being entitled to the reversion of the same premises. The Plaintiffs, in exercise of their powers, gave due notice of their intention to take the land, and purchased and took from *Sandeman* an assignment of his interest in the lease. The Defendant claimed 8400*l*. for the estate and interest in the premises, which, as tenant for life, and as the party in receipt of the rents and profits, he could convey to the Plaintiffs under the Lands Clauses Act, and for compensation for damages by reason of the execution of the railway. The Plaintiffs not assenting to this claim, and requiring possession of the land,

A railway company, having purchased and taken an assignment of the interest of a leaseholder in certain premises, also took, under their compulsory powers, the interest of the freeholder in the same premises, and paid the amount of the valuation of such interest, and compensation for injuriously affecting the other adjacent property of the freeholder, into court. The freeholder, afterwards objecting to the formation of a coal depôt on the premises which had been so taken,—not having executed any conveyance of the property to

the company,—brought his action against the company, treating them as assignees of the lease,—for damages, upon the covenants therein,—but the Court restrained the action, without prejudice to any proceedings against the company, in which their title as owners of the land should be admitted.

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proceeded to a valuation of the interest of the Defendant, and paid the amount of such valuation into court, giving bond for a like amount, under the provisions of the Act. Surveyors were, however, subsequently appointed by each party, who chose an umpire, by whom the sum of 5079*l*. was awarded to the Defendant as the amount of purchase money and compensation to be paid by the Plaintiffs for and in respect of the estate and interest so claimed by the Defendant, subject to the said lease, or which, under the powers of the said Acts, he might be entitled to sell and convey, of and in the said land; and the amount so awarded was paid into court, in pursuance of the Act. The solicitors of the Defendant forwarded the abstract of the title to the Plaintiffs' solicitors; but subsequently objections were raised to the completion of the purchase, on the ground asserted on the part of the Defendant, that the Plaintiffs were not empowered to take and use the land as a depôt for coals.

In 1852, whilst the transaction as to the purchase remained in this state, and after the Plaintiffs had constructed the railway over the land, and had erected thereupon a steam engine to raise, and a stage and platform to deliver into waggons, coals brought by the railway, the Defendant brought his action against the Plaintiffs for damages,—the declaration stating the covenants entered into by *Sandeman*, and that the premises demised to *Sandeman*, and which were then the site of a brick building and coal depôt, had by assignment legally come to and vested in the Plaintiffs, and by the first count complaining that the Plaintiffs had cut down and destroyed productive fruit and other trees, and had not planted other trees in lieu of those so cut down and destroyed, and had without the license of the Defendant excavated and carried away the soil of the said land, and had erected thereon a brick building used as an office, and also a depôt for coals, to the nuisance of the De-

fendant and his other tenants, and so as to render the said land incapable of cultivation, and had not properly stocked, cultivated, and manured the said garden and garden ground respectively; and by the second count, that the Plaintiffs had by the means and in the manner aforesaid, and while the said land was in the possession of *San'leman*, as a tenant thereof to the Defendant, injured the Defendant in his reversionary estate and interest in the said land; and by the third count, that the Plaintiffs, as tenants to the Defendant, had by the like means and in like manner injured the Defendant in his reversionary estate and interest in the said land; and by the fourth count, that the Plaintiffs had wrongfully converted to their own use the Defendant's goods upon the said land; and by the fifth count, that the Plaintiffs had used and worked their railway, and also a stationary steam engine and chimney belonging thereto, and had shot and unloaded coals upon the said premises, and caused large volumes of smoke to escape into the air, and had thereby injured the Defendant's reversionary estate and interest in certain messuages in *Highbury-place* and *Highbury-crescent*; and the Defendant thereby claimed damages to the amount of 2000*l*.

The Plaintiffs thereupon filed their bill, praying a specific performance of the contract for the purchase of the land, and for an injunction to restrain the Defendant from proceeding with the action, or commencing any other action against them in respect or on account of any breaches of the covenants contained in the lease to *Sandeman*, or in respect of any injury or damage occasioned to the reversionary estate and interest of the Defendant in the premises comprised in the award of the umpire, or in any adjoining premises, by reason of the occupation and user on the part of the Plaintiffs of the railway, or the works and conveniences in connection therewith.

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Argument.

The *Solicitor-General*, Mr. *Daniel*, and Mr. *Rodwell* moved for the injunction in the terms of the prayer.

The company had become the purchasers of the land according to the mode in which the Act enabled them to acquire a title; and although the Defendant had delayed to execute the conveyance, the company were the owners in equity. The Defendant was a trustee of the legal estate for the company, and the Court would not permit him to make use of the trust estate for the purpose of impeaching the title of his cestui que trust. With reference to the complaint of the Defendant of what is described as a nuisance, it is clearly no more than a result which the Act contemplates in the powers which it confers: *The King v. Pease*(a), and for which the Defendant might, and in fact did, claim and obtain compensation: *Turner v. Sheffield and Rotherham Railway Company*(b).

Mr. *Baily* and Mr. *Hobhouse* for the Defendants opposed the motion, and contended that the company could only take the land for a purpose which was lawful; and that whilst the legality of their user was in question, there was no equity to restrain the Defendant from using any legal right which he might possess. The Court would not permit the company by an abuse of the powers of the Act to gain an illegal advantage. The fifth count of the declaration was, moreover, in substance an action for a nuisance, and which arose altogether independently of the existence of the lease to *Sandeman*. The question would turn, first, upon the powers of the company under their Act; and secondly, upon the question whether the user of the steam engine, and the shooting of the coals, are acts fairly subsidiary to the use of the railway, and not done in the prosecution of some distinct trade or business out of the pur-

(a) 4 B. & Adol. 30.

(b) 10 M. & W. 425.

view of the company's Act of incorporation. The company had no right to permit coals to be screened on the line. That was an operation of business in which their parliamentary powers did not authorise them to engage. They were carriers only, and could not be dealers or perform the business of dealers in coals.

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VICE-CHANCELLOR:—

It is impossible that the Court can permit this action to proceed. It is clear that the company have by their Act, which incorporates the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, power to purchase lands for all the purposes for which the company is constituted, and which include powers to "erect and construct such houses, warehouses, offices and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper, and from time to time to alter, repair, or discontinue the before-mentioned works, or any of them, or substitute others in their stead" (a). The company are authorised to be carriers themselves, and they are bound to furnish accommodation for the business of other carriers. As carriers, the company have a right to acquire property for the purpose of making a dépôt for loading and unloading coals or other goods. This being the state of the case as to the powers granted by Parliament, these powers were put in force by serving Mr. *Dawes* with the usual notice necessary to enable the company to become purchasers and owners of this property. They proceeded by arbitration, Mr. *Dawes* having chosen that course instead of bringing the case before a jury. Before the arbitrator and the umpire, Mr. *Dawes* claimed, not only for the land to be taken, but the damage to be done by severance in injuriously

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(a) Railway Clauses Consolidation Act, 8 Vict. c. 20, s. 16.

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affecting his other lands and neighbouring property. Every possible claim which he was entitled to raise in that case, was submitted to the arbitrator; and it has been admitted on the part of the Defendant, that the compensation which was claimed, and upon which the award proceeded, included all injury which could follow from the proper and legitimate exercise of the powers of the company. The arbitrator made his award, and the company became purchasers of the land at the price thus settled. The question which has now been chiefly argued before me has been, to what use the company have applied, or intend to apply, the land? It is not denied that the company intend to use the land for the purpose of unloading and delivering coals brought there by the railway. It may be another question whether the company have or have not used the land in a way in which they are not warranted by their Act; but how can I say that the company, having bought the land for the legitimate purpose of unloading goods and merchandise which they carry upon the railway, and using the land afterwards for the purpose of unloading such goods and merchandise only,—coals being one of those articles,—and erecting a station, steam engine, and machinery, and other conveniences, for lifting and unloading the coals and screening them,—how can I say, in that state of circumstances, the company having paid for the land, by paying the money into court, according to the terms of the Act of Parliament, so as to complete the sale and purchase, and become, in a court of equity, the legal owners of the property, that they are not to retain it, and that their ownership is to be called in question for acts done in the exercise of that ownership? The action which the Defendant has brought, is an action that entirely disputes the ownership of the company. It has been said, that the question really intended to be tried by the action, is the right of making the use of the property which has been the subject of complaint. The Defendant, in effect, says, that the company have acquired possession on the assumption

that they intended to make a lawful use of the premises, but that they have applied them to an unlawful use. He says, that they had two objects, one of which it was, under the Railway Acts, competent to them to pursue, and the other of which it was not,—and that the company having endeavoured to effect the unlawful object, are not therefore purchasers. Whether the Defendant might have resisted the proceedings of the company for the purpose of taking the land, on the ground that they did not require so much for any legitimate purpose, or that they were seeking to exercise their powers for an unlawful purpose, it is not necessary, at present, to inquire; but the price of the land having been settled, and the money having been paid, according to the usual form of proceeding, the company have become owners in equity of the land, and are only not the owners at law because they have not yet obtained a conveyance. In such circumstances, the Defendant cannot be allowed to proceed for damages as still owner of the reversion.

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The injunction must be granted, but without prejudice to any action which the Defendant may be advised to bring against the company for the alleged illegal use of the lands in question, admitting, in such action, that the company are the absolute owners of the premises.

BEST v. DRAKE.

Feb. 26th.

THE Plaintiff had become the purchaser of some leasehold houses, which were let to tenants at weekly rents. The purchase had been completed, the assignment executed, and restrain a mere stranger from vexatiously distraining on or otherwise molesting the tenants.

The Court has no jurisdiction at the suit of an owner of property, to molesting the

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he had entered into possession, when the vendor, who had sold the premises as executor under a will, endeavoured to recover possession of the property, and for that purpose brought an ejectment against the Plaintiff, and was nonsuited in the action. He subsequently distrained upon the tenants for alleged arrears of rent, seizing in some cases their goods, and in others receiving money from them as payment. The Plaintiff proceeded against the Defendant for these acts by summons before a magistrate, who ordered the goods which had been taken to be restored. The Defendant, nevertheless, persisted in issuing distress warrants against the tenants of the property, claiming as landlord to be entitled to subsequent rents; and the Plaintiff now filed his bill, praying that he might, by the decree of the Court, be quieted in the possession of the property, and that the Defendant might be restrained by injunction from distraining upon or taking away the goods, or otherwise molesting, annoying, or interfering with the tenants of the said leasehold messuages.

Argument. Mr. *Sheffield* moved ex parte for the injunction, and submitted that the Plaintiff was entitled to the aid of the Court, such being the relief afforded upon a bill of peace.

Judgment. VICE-CHANCELLOR:—

I am not aware of any authority for an application of this nature. The Plaintiff is the owner of the legal estate, which is vested in himself, and he has, upon the strength of that estate, successfully resisted an ejectment. The Court is asked to interfere for the purpose of preventing annoyances to property by a mere stranger,—a protection which there are other jurisdictions perfectly competent to afford.

It is not in such a case that a bill of peace is applicable. Such bills, which it is said may be brought to quiet possession after a right has been repeatedly determined at law, stand upon a different footing. In a recent case before the Lords Justices (a dispute between several gas companies at *Sheffield*), their Lordships refused to interfere by way of injunction, although annoyance and injury of the most serious kind were alleged to be taking place, and to be apprehended.

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Motion refused(a).

(a) See *Davenport v. Davenport*, 7 Hare, 217, shewing circumstances the very opposite of those in the above case,—an application by a party claiming, but not having established a legal title, and being out of possession, and in which it is not the principle of this Court to interpose. These examples of extreme yet contrasted cases, beyond the limits of equitable relief, exhibit and illustrate the rules by which it is governed.

It may be a question whether bills of peace and bills to quiet possession are not of that class of subjects with regard to which the jurisdiction of the Court is now almost obsolete, and which was only suited to a state of society in which the ordinary administration of justice was less regular and certain. See 1 Spence 684. In 1 Van Heythusen's Eq. Dr. p. 611, there is a well-known precedent of an information and bill, in the nature of a bill of peace, in which several of the inhabitants of a district, unconnected with each other except by that circumstance, are made Defendants. It is probable that such

a form of suit, which was admitted in the case of title suits up to the time of their cessation, would at this day be deemed oppressive on Defendants. A remarkable example of an early attempt to extend or to abuse the practice of the Court, which, in some few cases, allowed claims against distinct persons to be made the subject of the same suit, is mentioned in the Diary of *Narcissus Luttrell*, which has been brought to light by the notice of Mr. *Ma-caulay*, and recently printed (*Oxford*, 1857, vol. 1, p. 197). It took place in the time of Lord *Nottingham*. "A bill in Chancery was this term preferred by a widow against 500 persons, to answer what moneys they ow'd her husband; the bill was above 3000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each Defendant a 100*l.* the copyeing out, he dismissed the bill, and ordered Mr. *Newman*, the counsellour, whose hand was to it, to pay the Defendants the charges they have been att."

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July 20th,
& 21st.
Aug. 3rd.

CATTLIN v. BROWN.

After a devise to A. for life, with remainder to all and every the child and children of A. for their lives, in equal shares, a devise over, after the decease of any or either of such child or children, of the part or share of him, her, or them so dying, unto his, her, or their child or children, begotten or to be begotten, and to his, her, or their heirs for ever, as tenants in common, is good as to the children of such children of A. as were living at the death of the testator, for the gift to them must take effect, if at all, within the limits allowed by law; and the gift to every member of the class of children is single and independent of the gift to every other member of the same class, and cannot be affected by the result of the gift as to such other members.

THE question arose upon a devise by *Frances Bannister* who died in 1805, to *Thomas Bannister Cattlin* for life, with remainder to all and every the child and children of the said *Thomas Bannister Cattlin*, during their natural lives, in equal shares if more than one; and after the decease of any or either of such child or children, then the part or share of him, her, or them so dying unto his, her, or their child or children lawfully begotten or to be begotten, and to his, her, or their heirs for ever, as tenants in common.

The testator died in January, 1805.

Thomas Bannister Cattlin had issue five children; namely, *George*, *Emma*, *Cecilia*, *Caroline*, and *Clement*, who were born in the lifetime, and were living at the death of the testator; and one child named *Judee*, who became the wife of *Adam Brown*, and went to *India* in 1828, and it is presumed died on her passage or immediately after her arrival, as she was not afterwards heard of, and who left issue several children, some of whom survived *Thomas Bannister Cattlin* the tenant for life. *Caroline*, one of the children, who survived the testator, had also issue several children. *Thomas Bannister Cattlin* also had other issue, ten children, *Thomas Magnus*, *Charlotte*, *Frederick William*, *Elizu*, *Frederick Fisher*, *William*, *Emily*, *Clarissa*, *Mary*, and *Susannah*, born after the decease of the testator. Of these, two, *Frederick William* and *Eliza*, died in his lifetime without having had any issue. Several of the other children who were born after the death of the testator had issue.

The devised estate was subject to a mortgage created by the testator for securing the payment of 2000*l.* and interest; and under the decree of the Court, made in 1843, the same estates were conveyed in fee by way of mortgage to secure 2574*l.* and interest, which was raised to pay the debts of the testator.

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Mr. Willcock, and Mr. Prendergast, for the Plaintiffs.

Argument.

Mr. C. P. Cooper, Mr. Rolt, Mr. J. Baily, Mr. Rogers, Mr. Elderton, Mr. Terrell, and Mr. Waller for the other parties.

The authorities referred to are mentioned in the judgment, with the exception of *Griffith v. Pownall*(a), which is to the same effect as the cases referred to in the fifth rule(b).

VICE-CHANCELLOR :—

The point in this case is one of some novelty, and I therefore propose to state somewhat fully the reasons that have led me to the conclusion to which I have come.

Judgment.

The question arises on a short devise to *Thomas Bannister Cattlin* for life, and after his decease to all and every his children or child, for their lives, in equal shares, and after the decease of any or either of them, the part or share of the child so dying unto his, her, or their children or child, and his, her, or their heirs for ever, as tenants in common.

There were some children of *Thomas Bannister Cattlin*

(a) 13 Sim. 393.

(b) *Infra*, p. 377.

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 ———
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in esse at the death of the testator, and others who were subsequently born; and the question which has been argued is, whether the remainder in fee to any of the grand-children could take effect, it being admitted that the remainder in fee to the children of those children of *Thomas Cattles Brown* who were born after the death of the testator cannot take effect.

The first observation that arises in this case is, that the limitations are none of them by way of executory devise, but are limitations of contingent remainders. I apprehend, however, that a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law. It has been sometimes a question whether a limitation over beyond the period might or might not be supported as a good contingent remainder, on the ground of its destructibility in the lifetime of the tenant for life. Mr. *Jarman* in his learned work discusses the point, and observes, "the same species of reasoning by which a remainder or an executory limitation, to arise on the determination of an estate tail, is supported, might seem to apply to a contingent remainder, which is liable to be destroyed by the act of the owner of the preceding estate of freehold, no estate being interposed for its preservation; but the writer is not aware of any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, be devised to A. for life, with remainder to his eldest son who should be living at his decease for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease; although A. in his lifetime might destroy all the remainders, and the eldest son after his (A.'s) decease might destroy the ultimate remainder in fee devised to his children, without being amenable either at law or in equity to the persons whose estates are thus destroyed, such ultimate

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remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in these cases is effected by what the law calls a tortious or wrongful act (though it is a wrong without a remedy), the perpetration of which is not to be presumed"(a). The latter observation applies very strongly to this case, for here the legal estate is outstanding and subject to a mortgage, and the party in whom such legal estate is vested would be, in effect, a trustee to support the contingent remainder, the destruction of which, under such circumstances, could only be effected by an act which would be doubly tortious. The rule is stated in the able argument of Mr. Preston, in *Mogg v. Mogg*(b). He says, "A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect"(c). That is, I think, a perfectly accurate statement of the law which I am to apply to this case.

I am bound, however, in this case, to look at the whole question, and to consider how it would stand on the doctrine which has been established with regard to gifts by way of executory devise.

The first rule is, that an executory devise is bad unless it be clear, at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. This principle will be found expressly stated in the opinion delivered by the present Lord Chancellor, when advising the House of Lords in the case of *Lord Dungannon v. Smith*(d).

The second rule is, that you must ascertain the objects of

(a) 1 Jarm. Wills, 226.

(b) 1 Mer. 654.

(c) Id. 664.

(d) 12 Cl. & Fin. 546, 570.

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the testator's bounty, by construing his will without any reference to the rules of law which prohibit remote limitations; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

Thirdly, if the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. One of the earliest cases affirming this rule is that of *Proctor v. The Bishop of Bath and Wells* (a). The devise in that case was of an advowson, in fee, to the first or other son of *Thomas Proctor*, the grandson of the testatrix, that should be bred a clergyman and be in holy orders; but in case he should have no such son, then to another grandson of the testatrix in fee: and it was held that the first devise was void as depending on too remote a contingency; and that the latter limitation, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided. In the recent case of *Lord Dungannon v. Smith* (b), it was sought, in support of the bequest, to shew that one of the series of persons who might be the heirs male of the body of the grandson, might take within the prescribed period, and was not therefore within the objection; but the answer was, that "there was no gift to him in terms different from the gift to all others who may be able to bring themselves within the terms of the gift," and that "where a testator has made a general bequest, embracing a

(a) 2 Hen. Bl. 358.

also, *Ker v. Lord Dungannon*, 1

(b) 12 Cl. & Fin. 546. See, D. & W. 509.

great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, the one embracing the lawful, the other the unlawful objects of his bounty" (a).

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The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them nominatim, because they were intended to take in shares to be regulated in amount, augmented or diminished, according to the number of the other members of the class, and not to take exclusively of those other members. Of this rule the cases of *Jee v. Audley* (b), *Leake v. Robinson* (c), and *Gooch v. Gooch* (d) are illustrations. *Jee v. Audley* was a strong case of that class, for there all the children actually in esse might have taken, and it was only the possibility that there might have been incapable children, which excluded those who were capable.

The fifth and last rule to which I need to advert, is this,—that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs v. Benbow* (e). That was a gift of 500*l.* apiece to each child that might be born to either of the children of

(a) 12 Cl. & Fin. 574.

(b) 1 Cox, 324.

(c) 2 Mer. 363.

(d) 14 Beav. 565.

(e) 2 Myl. & K. 46.

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the testator's brothers, without benefit of survivorship. The legacy of 500*l.* to each of the children living at the death of the testator, who alone could take, was unaffected by the number of subsequently born children, who were excluded; and the exclusion of the latter did not therefore affect the children who were capable of taking under the bequest. The last rule, in fact, amounts to no more than this,—that the gift being single to each party, you have only to consider whether that particular gift must of necessity vest, if at all (according to the first rule), within the limit allowed by law.

Let us now consider the facts of the present case, and apply the rules which have been stated to those facts; and inquire whether the gift be or be not to a number of persons in shares, which, being distinctly ascertained and settled, are incapable of augmentation or diminution. And here I would observe, that it at first appeared to me that there was no distinction between the present case and the late case of *Greenwood v. Roberts (b)*, where there was a gift of an annuity to the testator's brother, and, after the decease of the annuitant, to and amongst such of his children as might be then living, in equal shares during their lives, with a provision that at the decease of any of them, so much capital as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be forthwith converted into money, and divided equally amongst the children of him or her so dying, as and when they should severally attain the age of twenty-one years; and he gave them vested interests therein, and directed, that if any children of his brother should at his decease be dead, and had left issue, such issue should have the share the parent would have had if he had outlived the brother. If the

(a) 15 Beav. 92.

circumstances of that case had not in fact been distinguishable, I should have been under the necessity of differing from it; but in that case the children of the brother, who were born and in esse at the death of the testator, might all have been dead at the death of the brother. The case therefore fell within the third and fourth rules which I have mentioned. It was a gift to a class to be ascertained at a time beyond the limits of remoteness, and all the members of the class might be persons without these limits. The children born at the testator's death might take no interest whatever. On this ground the decision in *Greenwood v. Roberts* was, no doubt, perfectly right.

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The testator devises the estate to *Thomas Bannister Cattlin* for life, with remainder to all his children as tenants in common for life, with remainder as to every share of every child to the children of that child in fee. Now, to follow the respective shares of the property, suppose *Thomas Bannister Cattlin* to have four sons, *A.*, *B.*, *C.*, and *D.*, and *A.* and *B.* to be living at the testator's death and the others to be born afterwards. *A.* and *B.*, on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of *C.* and *D.*, but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests nor the remainder in fee are capable of being wholly divested in favour of any party beyond the legal limits, neither could any one intended by the testator to take an interest, but at a period beyond the legal limits, possibly take in lieu of *A.* or *B.*; their shares are not therefore within the third rule, or governed by the judgment in the case of *Lord Dungannon v. Smith*, as might have been the case if the devise had been to the sons of *Thomas Bannister Cattlin* living at his decease, with

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remainder to their sons in fee, for then there might possibly, at the death of *Thomas Bannister Cattlin*, have been no son who was in existence at the testator's death. Neither, again, can any possible event happening after the death of *Thomas Bannister Cattlin*, augment or diminish the share of *A.* or *B.* Here, then, *A.* and *B.* are respectively persons in esse at the death of the testator, who are to take a share that must be ascertained in a manner incapable of augmentation or diminution at the expiration of another life in esse. What is there to prevent the limitation of that share to him for life, with remainder to his children in fee? for this share must of necessity vest, if at all, within the legal limits, and complies, therefore, with the rule. It is in reality the case of *Storrs v. Benbow*, substituting a given share for a given sum of money.

The two shares of *A.* and *B.*, in the case I have supposed, are wholly free from the questions which arose in *Leake v. Robinson*, or *Lord Dungannon v. Smith*. Sir *William Grant*, in *Leake v. Robinson*, speaking of the bequest made by the testator in that case, says: "He supposed that he could do all that he has done,—that is, include afterborn children, and also postpone the vesting until twenty-five. But if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the afterborn grandchildren, rather than abridge the period of vesting? I should think quite the contrary" (*a*).

The present case is free from the difficulty which is pointed out in those remarks, and upon which the point in that case was determined. The case of *Dodd v. Wake* (*b*), which was mentioned, comes within the same category as

(*a*) 2 Mer. 388.

(*b*) 8 Sim. 615.

Greenwood v. Roberts. In *Dodd v. Wake*, the bequest of a sum of money was limited unto and amongst the children of the testator's daughter, who should be living at the time the eldest should live to attain the age of twenty-four years, and the issue of such of the children of his said daughter as might then happen to be dead leaving issue, to be equally divided between or among them, share and share alike, as tenants in common. There were three children living at the death of the testator, who might have attained the age of twenty-four within the proper period,—but upon that form of bequest it seems clear, as the Vice-Chancellor held, that the testator did not intend it to apply of necessity to any existing child, but to take effect only when the first child attained twenty-four, which might possibly be without the period of legal limitation. The children living on that event might or might not be composed of a class not in existence at the death of the testator.

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In the case now before me, no person out of the prescribed limits could possibly take the whole of *A.* or *B.*'s share, and the exact amount of each share is finally ascertained within the legal limits; and from the time that it is so ascertained, no party without the legal period can possibly acquire the least interest in it, so as to divest or diminish it; nor can any party whose interest is so ascertained within the period, or his children, acquire any interest in the shares of such other parties so as to augment it.

The limitation as to the shares of *C.* and *D.* in the case I have supposed would be clearly void, as their children might be born at a period exceeding the limits which the law allows, they themselves not being in esse at the death of the testator. I observe that Mr. *Jarman* expresses a doubt whether the state of events should not be considered

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as they stood at the date of the will (a). It is now clear that the death of the testator is the time to be looked at. The rule on this point is plainly expressed by the present Lord Chancellor in the case of Lord *Dungannon v. Smith*, where, observing that a gift to the person who at the death of *B.* should be the heir male of his body, if he should attain twenty-one, would be good as to the person who should be heir male of *B.* at his death, he adds: "It would be good, because at the death of the testator it would be absolutely certain that the bequest must take effect, if at all, within twenty-one years after the death of *B.*; and it would not be rendered invalid by a subsequent gift to others, which might be too remote" (b).

The declaration will be, that the estate was by the will of the testator well limited in fee to the children of those children of *Thomas Bannister Cattlin* who were living at the death of the testator.

(a) 1 Jarm. Wills, 229 n. (s).

(b) 12 Cl. & Fin. 574. See also *Williams v. Teale*, 6 Hare, 239.

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AN

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THE

ELEVEN VOLUMES OF THESE REPORTS.

ABANDONED MOTION.

See MOTION.

ABATEMENT.

See DISMISSAL—EVIDENCE—MOTION—
TAXATION.

1. The defendant in an abated suit is not entitled to deal with the subject of the suit in contravention of orders made in the cause before the abatement: the proper course for the defendant in such a case is, to apply to the Court that the bill be dismissed in default of revivor by the proper parties within a certain time; or, that he may be at liberty to act notwithstanding those orders; or himself to revive the suit and proceed in it. *Fisher v. Fisher*, iv. 196

2. Interim order on petition in an abated suit, in the nature of an injunction, for a limited time, to protect property in question in that suit, but administered in a suit before another branch of the Court,—giving the petitioner an opportunity of applying in such other branch of the Court, he undertaking to revive, or otherwise make himself a party to, the abated suit. *Ib.*

ABATEMENT OF LEGACIES.

See ACCUMULATION.

ABJURATION.

See ALIEN.

ABSCONDING.

See PRO CONFESSO.

Defendant residing out of the jurisdiction deemed to have absconded to avoid the

ABSOLUTE INTEREST.

process of the Court, under the 1st Order of the 11th of April, 1842. *Hele v. Ogle*, ii. 623

ABSENT PARTIES.

See JOINT STOCK COMPANY.

ABSOLUTE INTEREST.

See LEGACY—WILL.

1. The testator, by his will, desired that everything, during the life of his wife, should remain as it was, for her use and benefit; and after her decease he gave his real estate to his male heir, and his personal estate to his children, adding that he gave the above devise to his wife, that she might support herself and her children according to her discretion, and for that purpose:—*Held*, that the widow took an absolute interest for her life in the real and personal estate. *Thorp v. Owen*, ii. 607

2. A gift of the yearly interest, dividends, proceeds, and profits to arise from the shares of the testator in a pottery, ship-building yard, shipping, trust-monies, effects, and premises, to his wife for her life, for the maintenance, education, and support of herself and his children; and subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally; and, the testator particularly recommended, desired, and directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children in equal shares:—*Held*, that the attempted disposition of the savings of the widow was

ABSOLUTE INTEREST.

in the nature of a precatory gift; but, the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift, and no trust created of the savings in favour of the children; and that the same, therefore, belonged to the estate of the widow. *Cowman v. Harrison*, x. 234

3. Where trust funds were settled to the separate use of a married woman for her life, and after her decease upon trust for such persons as she should by will appoint, and in default of appointment for her executors and administrators,—she, having become a widow, applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment: and it was held that she was absolutely entitled to the trust funds, and the order was made accordingly. *Page v Soper*, xi. 321

ABSTRACT.

See APPENDIX, vol. ix, p. i—NOTICE.

ABUSE OF PROCEEDINGS OF THE COURT.

See CONTEMPT.

ACCEPTOR.

See TRUSTEE AND CESTUI QUE TRUST.

ACCOMMODATION BILL.

See BILL OF EXCHANGE—PRINCIPAL AND SURETY.

ACCOUNT.

See ADMINISTRATION SUIT—APPENDIX, vol. x, p. ix—ASSIGNMENT—CHARITABLE USE—CONSIGNEE—CONTEMPT—CONTRACT—EVIDENCE—JURISDICTION—LUNACY—MISTAKE—PARTIES—PARTNERSHIP—POWER—SET-OFF—SUPPLEMENTAL BILL.

1. In a suit by residuary legatees of A. against the personal representatives of B., who was the executor of A., for payment of a debt due from B. to A., the amount of which was not admitted, and also for an account of the personal estate of A., praying also, unless assets were admitted, an account of the personal estate of B., and, that being insufficient, seeking to charge his real estate:—*Held*, that the plaintiff was not entitled to a declaration, that a particular debt or sum constituted an item in the account to be taken; but that evidence tending to show that the defendant should be charged with such particular debt or sum was admissible. *Tomlin v. Tomlin*, i. 236

ACCOUNT.

The cases of *Law v. Hunter*, *Hornby v. Hunter*, and *Walker v. Woodward* observed upon. *Ib.*

2. Decree for taking accounts contingent upon a preliminary finding as to the nature of the estate. *Reeve v. Attorney-General*, iii. 193

3. The defendant, who was a customer of, and had an account with, a bank, was also employed by the bank to raise money on certain Spanish bonds, which he accordingly did; the money being afterwards recalled by the mortgagees and not paid, the bonds were sold; and the defendant received the balance, and retained it without the knowledge of the bank. On a bill filed on behalf of the bank for payment of this balance, and also for a general account:—*Held*, that although the defendant, by his answer, said the result of the general account when taken would be in his favour, yet he was not entitled to withhold payment of the balance received by him in respect of the bonds until the general account should be taken; and a decree for payment of that balance and interest was accordingly made, and also the decree for taking the general account. *Gordon v. Pym*, iii. 223

4. As to the rule of the Court in requiring the accounts of the estate to be taken before deciding on the construction of a will. *Gaskell v. Holmes*, iii. 438

5. Although the bill brought by the executor stated that the debts, funeral and testamentary expenses, and legacies of the testatrix had been paid, and the residue specifically appropriated to answer the trusts of the will, and merely sought the direction of the Court as to the class of persons entitled to take under such trusts, the Court would not decide the question of construction until the accounts of the estate had been taken, unless it should appear that all the class entitled to take were parties to the suit, and competent to bind themselves,—and those parties should waive the accounts of the estate, and accept the same at a given amount,—and the personal representatives should admit assets for all purposes,—upon which consent and admissions a decree might be made finally disposing of the estate, but saving the rights of creditors. *Say v. Creed*, iii. 455

6. Decree in legatees' suit, on admission of assets, without taking the accounts. *Gordon v. Scott*, iii. 459, n.

7. The Court will not direct an account to be taken with annual rests where no special case for that form of decree had been made on the pleadings. *Neesom v. Clarkson*, iv. 97

8. Bill for a partnership account and injunction. Order, on motion by consent,

ACCOUNT.

to take the accounts. One of plaintiffs afterwards became bankrupt, and the defendant filed a supplemental bill, bringing his assignees before the Court, and moved that the proceedings under the order might be prosecuted as well against the new as against the original defendants. The Court, with the consent of the assignees, but without the consent of the solvent plaintiffs in the original suit, made the order. *Hitchcock v. Copling*, iv. 161

9. By a contract for the execution of railway works, after specifying certain works to be done for a gross sum, it was provided that extra works, which the Company or their engineer should, by any writing under his hand, require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions:—*Held* by the Vice-Chancellor of England (affirmed on appeal by the House of Lords), that a suit for an account of the monies due to the contractor, in respect of works done under the contract, was a proper subject of jurisdiction in equity. *Nizon v. The Taff Vale Railway Company*, vii. 136

10. *Held*, by the Vice-Chancellor *Wigram*, (upon exceptions,) that a direction for an account of extra works done by the plaintiff under and by virtue of the contract, did not authorise any account to be taken of works (other than the specified works) done by the contractor, with the privity of the Company, without written instructions; but that the Court would give the plaintiff liberty to bring his action at law against the Company, in respect of works done without such instructions,—not, however, relieving him against the legal effect of the lapse of time during the proceedings in equity. *Ib.*

11. *Quare*, whether, if the contractor could not, in covenant, recover for extra works done for the Company without written instructions, he might not recover in *assumpsit*. *Ib.*

12. Is it not an objection to a decree for one purpose, that it may involve the necessity of taking an account, which account it may possibly be necessary to take in another suit for another purpose. *Kirwan v. Daniel*, vii. 347

13. Demurrer allowed to a bill for an account, where it did not appear that the account between the plaintiff and defendant was mutual, as consisting of receipts and payments by each party on account of the other, and where it did not appear that the payments forming one side of the account

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were other than matters of set-off as against the receipts on the other side, and notwithstanding a statement in the bill that the defendant had, in a particular sale or transaction, acted as the agent of the plaintiff in receiving monies on his account. *Phillips v. Phillips*, ix. 471

14. Where a conveyance of an estate, obtained upon a pretended purchase from an aged and illiterate man, by a person who stood towards him in a confidential position, was set aside, the Court, being of opinion that there was in fact no purchase, refused to give the defendant a decree for an account of monies paid by or owing to him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase and conveyance. The rule, that a party coming for equity must do equity, does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought. *Wilkinson v. Fowkes*, ix. 592

15. It does not follow, that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal; for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. *Padwick v. Stanley*, ix. 627

ACCOUNT OF PERSONAL ESTATE.

See APPENDIX, vol. ix, p. vii.

ACCOUNTS AND INQUIRIES.

See APPENDIX, vol. ix, p. i.

ACCRUING SHARE.

See WILL, 4.

ACCUMULATION.

See TENANCY IN COMMON.

1. Direction to invest £10,000, 4l. per cent stock, in the name of trustees, and to pay thereout annuities to various persons, amounting in the whole to £400 a year; and that the trustees should hold the said stock and the dividends thereof subject to the annuities, upon trust, as to so much of the dividends as from time to time should fall in by the determination of the annuities, until one half of the dividends should have so fallen in, to invest the same and the resulting income thereof, in order to increase the capital of the said fund by accumulation; and so soon as one-half of the dividends should have so fallen in, to apply such moiety of the dividends, and also such further parts of the same as

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should from time to time fall in by the determination of the annuities respectively, and the whole of the dividends when all the annuities should have ceased, to certain charitable uses. The £10,000, 4l. per cent. stock was invested according to the will, and was subsequently converted into 3½ per cents., and the trustees thereupon reduced the payments to the annuitants by one-eighth, the dividends having become to that extent insufficient to answer the annuities. The death of some of the annuitants afterwards released a part of the dividends, and the sums so falling in were accumulated. In an information to establish the charity:—*Held*, that although the accumulation of the dividends had not begun until the death of an annuitant, many years after the death of the testator, yet, by the statute 40 Geo. 3, c. 98, the accumulation must cease at the expiration of twenty-one years from his death. *Attorney-General v. Poulden*, iii. 555

2. That the annuitants were not entitled to be paid their annuities in full, either out of the capital or out of the released dividends, but that the reduction of the stock would operate to produce a proportionate reduction in the several annuities, and in the fund applicable to the charity. *Ib.*

3. That the whole of the accumulated fund, arising before a moiety of the dividends was released by a cessation of the annuities, was undisposed of by the will, and formed part of the residuary estate. *Ib.*

4. A direction, by will, to pay out of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumulation, by the Thelluson Act (39 & 40 Geo. 3, c. 98), restricted to twenty-one years only. *Basil v. Lister*, ix. 177

5. Where a gift to children is not made or secured to them out of property springing from or settled upon their parents, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it is not a portion within the meaning of the 2nd sect. of the Thelluson Act; and the circumstance, that the gift is a part of the estate of which the parent is the residuary legatee, has not the effect of giving to the gift the character of a portion. *Jones v. Maggs*, ix. 605

6. There is no reason, and it is contrary to the policy of the Thelluson Act, to put a strained or forced construction on the term "portions for children" contained in the 2nd section of that Act. *Ib.*

7. Under the Thelluson Act, the residuary legatee was held to be entitled, at the expiration of twenty-one years, to the accumulations of a legacy given to the

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children of the testatrix's brother, and directed to be divided amongst them when they should attain twenty-one. *Ib.*

8. After several devises and bequests of real estate, farming stock, sums of money, and life annuities, to the seven sons and daughters of the testator, nominatim, the testator directed the surplus interest of the residue to be accumulated during the lives of his said children and the life of the longest liver of them; and, after the decease of the survivor of them, that his residuary estate should be divided amongst all his grandchildren, if more than one, equally; and if but one, then to such only grandchild:—*Held*, that, inasmuch as the direction for accumulation was not intended to raise the portion of any given child of any of the first takers, but was a chance limitation to whomsoever might be the surviving grandchild at the death of several persons, including uncles and aunts of the grandchild, with whose benefits under the will the gift to the grandchild had no direct connection, the case did not fall within the exception contained in the 2nd section of the Thelluson Act, which enables provision to be made for raising portions for any child or children of any person taking an interest under the conveyance, settlement, or devise; and that the direction for accumulation beyond the period of twenty-one years after the death of the testator was therefore null and void. *Burt v. Sturt*, x. 415

ACKNOWLEDGMENT.

See DEBTOR AND CREDITOR—HUSBAND AND WIFE—MORTGAGOR AND MORTGAGEE.

ACQUIESCENCE.

See ACCOUNT—CONSTRUCTIVE TRUST—GENERAL ORDERS, 1796, April 23—IMPROVEMENT—LAPSE OF TIME—PARTNERSHIP—SPECIFIC PERFORMANCE—TRUSTEE AND CESTUI QUE TRUST.

1. A colliery proprietor constructed a railway from his colliery across the lands of several other persons by agreement, and his solicitors wrote a letter to the defendant, across whose lands he desired to carry the railway, referring to the powers of a local Act of Parliament, supposed to enable him to take lands within a certain area for road-ways, and offering, on the part of the plaintiff, to pay him for the land at a fair valuation. The defendant did not reply to the letter, and the railway was made across his land without further communication with him. A year or two after-

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wards, the plaintiff and defendant had an interview, but did not agree as to the price to be paid for the land; and three or four years after the railway was made, the defendant brought his ejectment; whereupon the plaintiff filed his bill for an injunction, charging acquiescence. The Court, on motion, restrained the action, upon the plaintiff giving judgment in the action of ejectment, and paying a sum into Court not less than the amount of the utmost valuation of the land. *Powell v. Thomas*, vi. 300

2. *Quære*, whether, from the relation existing between the vendor and purchaser of land, constituting the purchaser a trustee of the purchase-money for the vendor, there arises any other than a constructive trust, as to which the relief in equity, by analogy to the Statute of Limitations, will be barred by long acquiescence. *Toft v. Stephenson*, vii. 1

3. Acquiescence by one of several co-plaintiffs in the act complained of, precludes the interference of the Court upon an interlocutory application, as much as upon decree; and the rule is the same, although some of the co-plaintiffs are infants. *Marker v. Marker*, ix. 15

4. Parties cannot be said to acquiesce in the claims of others, unless they are fully cognisant of their right to dispute them. *Marker v. Marker*, ix. 16

5. Effect of notice that a claim will be resisted in excluding an objection to relief on the ground of laches or acquiescence. *Morison v. Moat*, ix. 266

ACT OF PARLIAMENT.

See JOINT STOCK COMPANY.

1. An Act of Parliament, empowering commissioners to inclose the common lands in a certain township, reciting the titles of certain landowners, and that it would be greatly for the advantage of the proprietors of the common lands that the same should be divided and inclosed, enacted that it should be lawful for the commissioners to set out and make such ditches, watercourses, and bridges, of such extent and form, and in such situations, as they should deem necessary, in the lands to be inclosed; and also to enlarge, cleanse, or alter the course of, and improve any of, the existing ditches, watercourses, or bridges, as well in and on the same lands, as also in any ancient inclosures or other lands in the township, as they should deem necessary: *Held*, that the Act did not empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township, and thereby to obstruct the drainage of the lands in such other

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township, to the damage and injury of the owners of such lands. *Dawson v. Paver*, v. 415

2. Where an Act of Parliament empowers certain persons to deal with their own property, or with property in a certain place or district, or defined by a certain description, and does not, by express words, or by necessary implication, import that the Legislature intended to affect the rights of other persons in other property, Courts of law do not construe mere general words in the Act as affecting the rights of strangers as to property not within the description of that with which the Act expressly purports to deal. *Ib.*

3. Whether an Act of Parliament is to be deemed a Public Act, binding on all the Queen's subjects, or merely a Private Act, depends upon the nature and substance of the case, and not upon the technical consideration whether the Act does or does not contain a clause declaring that it shall be deemed to be a Public Act. *Ib.*

ACTION.

See AGREEMENT—ARREST—CREDITORS' SUIT—INJUNCTION.

ACTION OR ISSUE.

See TITHES.

ADDITIONAL LEGACIES.

See CONSTRUCTION.

ADDRESS FOR SERVICE.

See SERVICE.

The omission by the plaintiff to indorse an address for service on the writ, as directed by the 20th Order of the 26th of October, 1842, does not of necessity make the writ void; but the Court will, in the meantime, so deal with the proceedings which are under its control, by staying process or otherwise, as to give the party the benefit of the 20th Order. *Price v. Webb*, ii. 511

ADEMPMENT.

See LEGACY.

1. The testator bequeathed a sum of £3,000 to his daughter for her separate use, for life, with remainder to her children as she should appoint, and in default of appointment to her children equally; with provisions for survivorship, advancement, and for the substitution of their issue; and, subject to an annuity and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely.

ADEMPTION.

After the date of the will, the testator gave to his daughter and her husband a promissory note for £500 then due to the testator. In a suit by the children of the daughter against the son, claiming to have the legacy of £3,000 invested and secured for their benefit, the defendant tendered parol evidence, that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring, that it was to be in part satisfaction of the legacy of £3,000; and that the testator was advised by his solicitor, that it was not necessary to alter his will to give it that effect:—*Held*, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the will, of which subsequent transaction there was no evidence in writing. *Kirk v. Eddowes*, iii. 509

2. That the parol evidence was not received as evidence of revocation or alteration of any part of the will, but as evidence of a transaction whereby the legatee had received part of her legacy by anticipation. *Ib.*

3. That the advance to the daughter and her husband was an ademption pro tanto of the legacy bequeathed by the will for the benefit of the daughter and her children. *Ib.*

4. Whether, if the children had been all living at the date of the will, and been named therein individually, and not merely described as a class, the advance would have been an ademption—*quære?* *Ib.*

ADJOURNMENT OF CAUSE.

See SUBPENA TO HEAR JUDGMENT.

ADMINISTRATION.

See ACCOUNT—APPENDIX, vol. x, p. xxxiii — COSTS — DECREE — EQUITABLE SET-OFF — EXECUTOR — MORTGAGOR AND MORTGAGEE — RECEIVER.

1. In a suit by a simple contract creditor, whose debt was secured by a deposit of deeds by way of equitable mortgage, against the executors and devisees of the debtor, the mortgaged premises were sold, and were not sufficient to pay the plaintiff's debt. The general assets of the testator were insufficient to pay his debts and the costs of suit. The parties beneficially entitled under the devise by their answer disclaimed, but the bill was not dismissed against them:—*Held*, that the plaintiff as equitable mortgagee was entitled to the proceeds of the sale of the mortgaged premises, and the executors of the testator were entitled to retain in full out of the

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general assets the debts owing to them by the testator, and that the residue of the assets should be applied in the following order:—in payment,—first, of the costs of the executors, as between solicitor and client; secondly, of the costs of the plaintiff (including those of the purchaser, which the plaintiff was ordered to pay); thirdly, of the costs of the defendants beneficially entitled under the devise; and, fourthly, of the debts remaining due to the plaintiff and the other creditors. *Tipping v. Power*, i. 405

2. Administration of an estate where a creditor had obtained judgment upon a plea of *plene administravit* by two of the executors, and a confession of assets to a certain amount by another executor,—such assets consisting of money in the hands of bankers not reached by the execution,—which the two executors prevented from being paid upon the cheque of the third executor to the judgment creditor, and which was afterwards paid into Court. *Gaunt v. Taylor*, ii. 413

3. An executor, who, in an action at law by a creditor of the testator, has pleaded according to the truth of the case, is, when the assets are taken from him, and administered in equity, entitled to the protection of the Court against any personal liability in respect of such plea. *Ib.*

4. A party to whom letters of administration have been granted, as the attorney of the person entitled to the grant, and for the use and benefit of such person, is liable to be sued in respect of the estate by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right. *Chambers v. Bicknell*, ii. 536

5. A testator directed his debts to be paid, and appointed executors in England, and other executors in Italy, directing the English executors to transmit the residue to the Italian executors, and bequeathing such residue amongst classes of persons alleged to reside in Italy:—*Held*, that, the sum to be paid over being the residue after payment of debts, the Italian executors must be regarded as simply trustees of that fund, and not as executors holding it charged with debts; and that, therefore, inquiries must be directed to ascertain the persons beneficially entitled to the fund under the bequest. *Weatherby v. St. Giorgio*, ii. 624

6. In an administration suit, it appeared that the testator and his surviving partners were lessees of certain iron works and premises for a term of years, of which eleven were unexpired, and, as such lessees, were subject to covenants for rent, repairs, insurance, &c.; and that, by the articles of

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partnership, the executors of a deceased partner might elect to become partners in the concern or to withdraw the capital of the deceased therefrom:—*Held*, that, although the executors had elected not to become partners, and no breach of the covenants appeared to have happened, yet as such covenants, if broken, might leave the estate of the testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained; or if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund the same, if required to satisfy any such future demand. *Fletcher v. Stephenson*, iii. 360

7. In a suit for administration, instituted by the administrator, who was also the first tenant for life of the estate under the will, orders were made for the sale of Bank Stock and East India Stock, and for the realisation of other funds and securities, and the investment of the proceeds in Consols, but such orders were not prosecuted:—*Held*, in a suit by the next tenant for life, that the estate of the administrator (plaintiff in the first suit) was liable for the loss or damage occasioned to the estate of the original testator by the neglect or omission to carry into effect the directions of the said orders. *Sowerby v. Clayton*, iii. 430

8. Direction by will to lay out personal estate, consisting of Bank and East India Stock, and monies standing on other funds and securities, in the purchase of land, to be settled to certain uses:—whether the stocks and funds, not being Consols, ought to be sold and invested in Consols during the interval which elapsed before the purchase of lands was found—*quare?* *Ib.*

ADMINISTRATION SUIT.

See COSTS, 6—GENERAL ORDERS, 1841, August, r. XXX—MISREPRESENTATION—PARTIES—POSSESSORY TITLE—RECEIVER—SETTLEMENT—VOLUNTARY INSTRUMENT.

1. In an administration suit, a party interested in the residue by his answer averred, that, according to his information and belief, the suit was collusive as between the plaintiffs and the executors and other parties: there being no replication, the allegation was taken as proof of the fact; and it was held, that the fact was no objection to the making of the decree. *Humble v. Shore*, iii. 119

2. The 33rd Order of August, 1841, en-

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abling a plaintiff to proceed against one or more persons severally liable, does not apply to the case of an administration suit, in which a complete decree cannot be made unless all the persons liable are parties. *Biggs v. Penn*, iv. 469

3. Claim by a creditor, in an administration suit, to prove the penalty of a bond, as damages for the non-performance of a contract. The Master reported the claim. On exceptions, the Court gave the creditor liberty to bring an action on the bond. The action was brought, and the jury found a verdict for the plaintiff (the creditor), with but nominal damages. The Court, upon this result, refused the creditor the costs of making the claim before the Master, and the costs of the action, but gave him the costs of the exceptions. *Morgan v. Elstob*, iv. 477

4. A party entitled to, or taking by assignment, a legacy, or a share of a residuary estate, may institute a suit for the administration of such estate at any time before the complete administration of the assets, or before such legacy or residuary share is withdrawn from its position as assets unadministered, and constituted a trust-fund applicable to the specific trusts of the will; but, *semble*, where the right is unnecessarily exercised, the Court may make the decree without costs. *Cafe v. Bent*, v. 24

5. In the administration of assets, a voluntary bond is to be preferred to interest upon debts not by law carrying interest, payable under the 46th Order of August, 1841. *Garrard v. Lord Dinorben*, v. 213

6. A creditor recovered judgment, and sued out a writ of fieri facias thereupon, in the lifetime of his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was afterwards made in the suit of an equitable mortgagee of certain parts of the real and personal estate of the debtor against his devisee and executor, for the sale of the mortgaged property, and if the proceeds of such sale should be insufficient to satisfy the plaintiff's debt, *then* for an account and application of the general, personal, and real estate of the testator, in a due course of administration. After this decree, the judgment-creditor levied, under the fieri facias, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the Court refused, on two grounds—first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the plaintiff's demand; and secondly, because the judgment-creditor acquired a right to the goods

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of the debtor, by virtue of the writ of fieri facias, from the teste of the writ, and therefore paramount to the right of the executor. *Ranken v. Harwood*; *Ranken v. Boulton*, v. 215

7. The admission of an executor, by his answer in a creditors' suit, that he had paid certain legacies bequeathed by the testator, is not an admission of assets entitling the plaintiff to a decree against the executor for payment of his debt without taking the account, when the bill does not specifically charge the defendant with having made himself personally liable, but prays that an account may be taken, and the estate administered in a due course of administration. *Savage v. Lane*, vi. 32

8. Where a testator, in his lifetime, conveyed to trustees the mines and minerals under certain lands, upon trust for himself (the testator) for life, and after his death upon trust for sale, and out of the proceeds, first, to pay all his debts, so as to discharge his real and personal estate therefrom; secondly, to apply £3,000 to the purposes of his will; and, lastly, to divide the surplus amongst certain persons therein named: the persons to whom the surplus is thus given are proper parties to a creditors' suit seeking to follow the real as well as the personal estate of the testator; but the Court may, in its discretion, make a decree for administration in their absence. *Ib.*

9. The circumstance, that a fund, in which a party takes a life interest under a will, is transferred by the executor to the trustees of that fund appointed by the will, is not necessarily and conclusively a severance of the fund from the bulk of the estate, unless the executor has, by such transfer, done all that it is incumbent upon him to do in the administration of the fund. *Pennington v. Buckley*, vi. 451

10. Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, and which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not, ipso facto, trustees for the residuary legatees or the next of kin, but the corpus of the fund must be regarded as assets of the testator's estate unadministered ultra the life estate. *Ib.*

11. The circumstance, that the residue of the estate (omitting the fund so vested in trustees for the tenant for life) has been administered in equity, does not affect the principle; nor is it less applicable, because, from the time which has elapsed since the death of the testator, the executor is not a

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necessary party in the administration of the particular fund, and has not been made a party to the suit. *Ib.*

12. In a suit for administering the estate of one who had been the personal representative of another, the party entitled to a share of the residuary estate of such other person carried in a claim for such share, as a debt, before the Master; but the Master disallowed the claim, on the ground that such residuary share could not be allowed as a debt, unless it appeared that the clear residue, after payment of debts, &c., had been ascertained:—*Held*, that, in such a case, the claimant ought to have forthwith applied to the Court for a direction to the Master to receive the claim, or to be examined *pro interesse suo*, or for leave to file a bill for the administration of the estate in question, or take some such proceeding, and to stay the distribution of the estate of the representative in the meantime; and that he ought not to have delayed his claim until after the Master's report, and the order on further directions. *Rogers v. Rogers*, vii. 19

13. That where, after such delay, the claimant of the residuary share filed his bill against the parties in the administration suit, the Court, though it stayed the general distribution of the fund, would not stay the payment of the costs under the order on further directions. *Ib.*

14. A creditors' suit stayed, on the application of the executors, after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which would not have been necessary in the creditors' suit; it being competent to the Master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate. *Golder v. Golder*, ix. 276

15. Cases in which, the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit. *Young v. Hodges*, x. 158

16. Apportionment of debts and legacies between the pure personal estate and the personal estate savouring of realty, notwithstanding the form of the bequest which disposed of the former and not of the latter. *Edwards v. Hall*, xi. 22

ADMINISTRATOR.

See EXECUTOR—PRELIMINARY INQUIRIES.

ADMISSION AND DISCHARGE.

ADMINISTRATRIX.

See HUSBAND AND WIFE.

ADMIRALTY COURT.

See JURISDICTION.

ADMISSION.

See COPYHOLD—DEBTOR AND CREDITOR—EVIDENCE—PAYMENT INTO COURT.

An executor, charged with the receipt of rents, stated, in the schedule to his examination, that he had received, in respect of rents, after deductions to a certain amount for bills due from the testator to the tenants, so much; the Master charged the executor with the whole amount, including the alleged deductions:—*Held*, on exceptions, that, although the executor had, by this form of admission, charged himself with the aggregate sum, yet, as the whole statement must be read, he had also discharged himself, *prima facie*, by the evidence which it contained, of the repayment to the tenants; which repayment it was open to the other parties to impeach. *Inge v. Kenny*, iv. 452

ADMISSION OF ASSETS.

See ACCOUNT—CREDITORS' SUIT.

ADMISSION AND DISCHARGE.

1. A. transferred a sum of stock into the joint names of herself and B., and then informed B. of the transfer, expressing her confidence that B. would fulfil the wishes which A. might express to her respecting the same. After the death of A., her administratrix filed the bill against B. for the transfer of the stock as part of the personal estate of A. B., by her answer, admitted the transfer of the stock into the joint names of A. and B., and stated that A. afterwards, from time to time, told her (B.) what part of the stock and dividends should be transferred and paid to different persons, and, subject to such dispositions, desired her to hold the remainder for her own use; and B. also, by her answer, stated that she had, in pursuance of such directions, paid the several sums to the persons mentioned:—*Held*, that the Plaintiff, having read from the answer the admission of the transfer upon trust, was bound also to read, from the answer, the directions or declaration of A. as to the trusts upon which the fund was to be held and disposed of. *Freeman v. Tatham*, v. 329

2. That the Plaintiff ought not, in the circumstances of the case, to be allowed to

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withdraw that part of the answer which had been read. *Ib.*

3. That, as to B.'s statement of the declaration of A., that the residue should belong to B. herself, the Court would direct an issue, giving the Plaintiff an opportunity of examining B. thereon as to the directions given to her by A. *Ib.*

4. That the Plaintiff was not bound to read the statement in the answer as to the fact of the payments to the other persons having been made; and that B. was bound to prove, by other evidence, the payments which she had made in pursuance of the trusts. *Ib.*

5. On an inquiry before the Master, the Plaintiff read from the answer and examination of the Defendant, the executor, an admission that a promissory note for £400 belonging to the testator had come to the hands of the executor shortly after the testator's death; and the executor was then allowed to read the further statement, that, some years afterwards, when the Plaintiff (the sole residuary legatee) came of age, he had delivered the note to the Plaintiff, who thanked him for taking care of it. *East v. East*, v. 343

ADMISSIONS.

See EVIDENCE—INJUNCTION.

ADOPTION OF CONTRACT.

See ANNUITY.

ADVANCEMENT.

See PORTION—SATISFACTION.

ADVERSE POSSESSION.

See JURISDICTION—POSSESSORY TITLE.

1. A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer:—*Held*, that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner. *Hyde v. Dallaway*, ii. 528

2. A. T., a person of unsound mind, living in the family of M. D., became entitled as heiress-at-law to certain lands. M. D. received the rents and profits of such lands for thirteen years during the life of A. T., and eleven years after her death, when M. D. died. M. D. had procured A. T. to execute a will devising part of her estate, and also indentures for conveying other parts, to M. D. and her

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heirs:—*Held*, that M. D. had founded her title upon the instruments which she had procured A. T. to execute in her favour: that her claim to the lands in question must be deemed to be under, and not against, A. T.; and that there was, therefore, no adverse possession as against A. T., or those claiming under her. *Lewis v. Thomas*, iii. 26

ADVERSE TITLE.

See DISCOVERY.

AFFIDAVIT.

See AMENDMENT—APPENDIX, vol. ix. p. vii; vol. x. pp. i. ii. xxxv—COSTS—EVIDENCE—EXHIBIT—FORECLOSURE.

1. *Seemle*, the affidavit in support of the application to withdraw replication and amend. under the 15th Order of 1828, should specify the nature of the proposed amendments. *Philips v. Gosling*, i. 40

2. *Seemle*, the affidavit by the plaintiff himself of the materiality of the discovery sought, cannot be dispensed with on the motion to extend the common injunction, unless sufficient reason for the absence of such affidavit be assigned. *Scotton v. Garry*, i. 99

3. Upon a motion for the production of documents described in a schedule to the answer, and admitted to be in the defendant's possession, liberty will be given to the defendant to file an affidavit as a ground for qualifying the order for production, by permitting him to conceal such parts of the documents as do not relate to the subject of the suit. *Curd v. Carl*, i. 274

4. *Seemle*, on a motion to produce documents, the affidavit of the defendant is admissible to shew that the documents are within any ground upon which the defendant is entitled to withhold the production. *Llewellyn v. Bodeley*, i. 527

5. *Quere*, whether an affidavit might not be received in support of the motion for preliminary inquiries where the answer simply stated ignorance of the plaintiff's title? *Topham v. Lightbody*, i. 289

6. An affidavit, which does not express that the deponent "made oath," is not admissible. *Philips v. Prentice*, ii. 542

7. Affidavits filed after the answer cannot be read on a motion for a special injunction, in support of which no affidavits had been filed before the answer; and the rule is the same whether notice of the motion was given before the answer was put in or afterwards. *Manser v. Jenner*, ii. 599

8. It is only in very special cases, and not at the option of the parties, that affidavits are admitted on a motion, after it has been

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opened to the Court. *The East Lancashire Railway Co. v. Hattersley*, viii. 86

9. Form of order, by consent, for hearing a cause upon affidavits. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Co.*, ix. 448

AFFIDAVIT OF SERVICE.

See ORDER.

The application of a party by his counsel, for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service—no counsel then appearing for the opposing party. *Hutton v. Hepworth*, vi. 319

AFTER-ACQUIRED PROPERTY.

See POWER.

AGENT.

See BROKER—DISCOVERY—EXECUTOR DE SON TORT—INTEREST—PRINCIPAL AND AGENT—RECEIVER—SERVICE—SOLICITOR AND CLIENT—VENDOR AND PURCHASER.

1. The Factors Act (5 & 6 Vict. c. 39) applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house, not in the way of trade, to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. *Wood v. Rowcliffe*, vi. 191

2. Such "agent" is not an agent, nor is such furniture "goods and merchandise," within the meaning of the statute 5 & 6 Vict. c. 39. *Id.*

3. *Seemle*, the cases in which a mere agent may be made a party to a suit, and costs prayed as relief against him, are limited to cases of fraud, in the sense in which fraud is understood in a Court of equity, to which the agent is a party, and do not apply to a case in which, though the agent acts erroneously, he acts openly and avowedly. *Marshall v. Sladden*, vii. 428

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See ANNUITY—CHAMPERTY—CHARTERPARTY—CONSTRUCTION—CONTRACT—EVIDENCE—HUSBAND AND WIFE—INFANT—JOINT STOCK COMPANY—JURISDICTION—LIFE INSURANCE—NOTICE—PARTNERSHIP—PLEA—PUBLIC POLICY—RAILWAY COMPANY—SEPARATE USE

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—SHIP—SPECIFIC PERFORMANCE—
STAMP—STATUTES, CONSTRUCTION OF,
29 Car. 2, c. 3, s. 4—TITHES—VENDOR
AND PURCHASER.

1. A debtor effected an insurance on his life, one condition of the policy being, that, if it should be assigned *bonâ fide*, the assignee should have the benefit of it, so far as his interest extended, notwithstanding the assured should commit suicide: he deposited the policy with his creditor, accompanied by a letter, promising to assign it to him, when requested, as a security for his debt. No notice of the assignment was given to the assurers. The debtor committed suicide:—*Held*, that inasmuch as the deposit of the policy, and the agreement to assign it by way of security for a debt, constituted in equity a valid assignment as between the parties to the transaction, it was also an effectual assignment within the condition as against the assurers. *Cook v. Black*, i. 390

2. Bequest of a share in certain trust funds, in trust for A., his executors, administrators, and assigns, provided that if A. should, during the life of B. or C., assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share in the said moneys, if payable to himself, or his executors or administrators, would become vested in some other person, then, and in such case, all his estate, right, title, and interest in such trust monies should absolutely cease and determine, and thereby and thereupon become absolutely forfeited; and the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of B. and C., for the support and maintenance of A., and of his wife and family, or otherwise for his and their benefit, in such manner as the trustees should think proper, and, after the death of B. and C., should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of, A. and his family, in such manner as they should in their discretion think proper. A. assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and, a fiat being issued against him, he was declared a bankrupt:—*Held*, that, upon the execution by A. of the assignment, his share and interest in the trust monies became subject to the trust declared by the will for the benefit of A. and his wife and family; that A. was not of necessity entitled to any part of the income of the trust moneys separately from his wife and children; but that any interest of A. in the

trust monies not applicable for the support and maintenance of his wife and children passed to his assignees on his bankruptcy. *Hearsley v. Woodcock*, iii. 185

3. An agreement between B. and C. was communicated by one of the parties to A., after applications in writing from A. for the signature of the other parties to a memorandum expressing his interest as a partner in the transaction relating to the land, the subject of the agreement; and the Court held, that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in A.; and that A. might avail himself of the acknowledgment, notwithstanding the agreement between B. and C. was *res inter alios acta*, and notwithstanding A. objected to some of the terms in that agreement, as not truly expressing his partnership contract. *Dale v. Hamilton*, v. 392

4. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay £200 to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the £200 should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee; and on payment of the £200 all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee for two quarters, but having paid these sums to E., the *cestui que trust*, (as the latter admitted), the payee brought his action upon the notes against the maker:—*Held*, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action. *Beech v. Ford*, vii. 208

5. *Held*, in equity, that the agreement must be construed as a contract by the brother to provide for E. the annuity of £25, or the gross sum of £200, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract, and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother. *Ib.*

6. That the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuitry of cross actions which the rule of law occasioned, but on the ground that this Court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a Court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without de-

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prising another party altogether of such benefit. *Ib.*

7. A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave, and bequeath unto his (the covenantor's) daughter an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favour of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—*Held*, by the Court of Common Pleas, and by this Court concurring in the certificate,—that the husband and covenantor had not, under the circumstances, any good cause of action against the executor of the father; and that, if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action. *Jones v. How*, vii. 267

8. In a suit by the administratrix of a deceased child, claiming, under a covenant by the father, an equal share with his other children of his real and personal estate, against his devisees and executors, and for that purpose praying that his residuary estate might be ascertained,—the suit not being framed as a creditors' suit,—the residuary legatees under the will of the father are necessary parties. *Ib.*

9. On a treaty for an under-lease, a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, and also the covenants in the leases of the ground landlord; and the proposed lessee signed the memorandum, accompanying his signature by the qualification, that he agreed thereto subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solicitors to the proposed lessee, who made some alterations and returned the draft with a request that the lessor would at once grant the lease as altered, or refuse it. The lessor's solicitor sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor:—*Held*, that, upon the return of the draft lease not acceding to all the alterations, and in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants introduced by the proposed lessee on his signing the memorandum, the contract was incomplete,

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and the proposed lessee was at liberty to determine the treaty. *Lucas v. James*, vii. 410

10. *Quære*, whether the principle would apply in a case where there was no real or substantial distinction between the terms of an offer by one party, and of a qualified acceptance or adoption of such offer by the other. *Ib.*

11. *Quære*, whether the existence of a nuisance in the neighbourhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract: and whether otherwise, if the nuisance be not known to the vendor. *Ib.*

12. A signature in pencil is not necessarily deliberative, and may be equally binding on the party making it as the signature if written in another manner would be. *S. C.* vii. 419

13. If, upon a proposal and agreement for a life assurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy. *Collett v. Morrison*, ix. 162

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1. A., who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the treaty of 1783, and took the oaths of obedience to the American Government, and of abjuration of all other allegiance, married an American woman, and had a son of that marriage (L.) born in the United States. B. had a son (C.) who was also born in America, out of the Queen's dominions:—*Held*, that C. was capable of inheriting real estate as a British subject, within the statutes 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21. *Fitch v. Weber*, vi. 51

2. The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the statute 3 James 1, c. 4, ss. 22, 23, to the penalty of high treason, does not therefore disqualify the children of such British subject from inheriting, in the absence of any attainder of such British subject by judgment, outlawry, or otherwise. *Ib.*

3. The exclusion from the benefits of the statute 4 Geo. 2, c. 21, s. 2, of the children of fathers who, at the time of their birth, were liable to the penalties of high treason or felony in case of their returning into this

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kingdom or Ireland without the royal license, is not to be construed as requiring the Court to determine incidentally, and in the absence of the party charged, that he has been guilty of treason or felony; but the exclusion must be construed as restricted to that class of offences in which the penalty is annexed to the fact of returning without license. *Ib.*

4. The privileges which the statutes 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer, are the privileges of the children, and not of the father; and, therefore, acts intended by a British-born subject to have the effect of acts of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of the statutes of the 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes. *Ib.*

5. A person claiming the benefit of the statute 13 Geo. 3, c. 21, does not lose that benefit only because he does not conform or qualify in the manner prescribed by s. 3 of that statute, within five years from the accruer of his right or interest. *Ib.*

ALIENATION.

1. A bequest of a share of residuary personal estate in trust for A. for life, and after the decease of A. for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, and a gift over on default of such children; and a proviso, that, if A. should in any manner sell, assign, transfer, incur, or otherwise dispose of or anticipate his share or any part thereof, then, immediately after such alienation, sale, assignment, transfer, or disposition, the bequest in trust for A. should cease, determine, and become utterly void, as if the same had not been mentioned in the will, or as if A. were dead. A., being in prison for debt, presented a petition for his discharge under the Act 1 & 2 Vict. c. 110, and thereupon the vesting order was made: —*Held*, that there was a valid limitation over of the share of A.; that taking the benefit of the Insolvent Act was a voluntary alienation of his share by A., and was the event or one of the events on which the limitation over was to take effect; that the declaration in the will, that the gift should thereupon be void as if the same had not been mentioned in the will, applied to the event of there being no children; and the declaration, that it should be void as if A. were dead, to the event of there being children; that, although the limitation over took effect, the capital was not to

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be necessarily forthwith divided, for the determination of the life-interest did not alter the class which was to take, and which class included after-born children; that the children of the insolvent who had attained twenty-one had a vested interest in their respective shares of the residuary share bequeathed in trust for the insolvent, and had become entitled to receive the interest of the same; and that the infant children of the insolvent were entitled to contingent interests in their respective shares thereof; and that both interests were subject to the interests of any after-born children of the insolvent who might become entitled. *Rochford v. Hackman*, ix. 475

2. Property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and although a life interest be expressed to be given, it may be well determined by an apt limitation over. *S. C.*, ix. 480

3. Import and effect of Lord Eldon's judgment in *Brandon v. Robinson*. Distinction between a disposition to a man until he shall become bankrupt and after his bankruptcy over, and a gift to a man for life with a proviso restraining alienation. *S. C.*, ix. 482

4. Distinction between compulsory and voluntary alienation. *S. C.* ix. 484

ALIQUEOT SHARE.

See PARTIES.

ALLEGIANCE.

See ALIEN.

ALLOTMENT.

See COMMON LAND.

AMENDED BILL.

See ANSWER—DEMURRER—EXCEPTIONS—JOINT-STOCK COMPANY.

AMENDED BILL.

See GENERAL ORDERS, 1841, August, r. XXXII.

AMENDMENT.

See APPENDIX, vol. ix, pp. viii, lxi; vol. x, p. xxxv—COSTS—DEMURRER—EQUITABLE JURISDICTION—EXCEPTIONS—ORDER—REPLICATION—TIME.

1. An order for leave to amend, not served, does not prevent the defendant

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from consenting to the bill. *For v. Smith*. ii. 333

2. An order for leave to amend withdraws from the time of service only; and therefore an amendment may be taken by the defendant after the order is made, and before it is served on the parties. ii.

3. A plaintiff amending his bill after answer, by adding new defendants, does not thereby require a right to make a further amendment against the original defendants under the 13th Order of April, 1822, within six weeks after the answer of the new defendants are to be deemed sufficient; but the time during which the plaintiff may amend, under that Order, must be counted from the date when the last answer of the original defendants is to be deemed sufficient. *Emerson v. Emerson*. ii. 332

4. An application for leave to amend after answer, not founded upon the 13th Order of April, 1822, must be supported by affidavit, and confined to the facts required to be shown in cases within that Order, but sufficient also to satisfy the Court, that from the occasion and necessity for the proposed amendments, the leave ought to be given. 11.

5. The right of a plaintiff to call for an answer to his amended bill, does not depend on the fact of whether the order for leave to amend is made upon the undertaking to pay costs to the defendant, or to amend the defendant's office copy; and therefore, where the bill was amended under an order whereby the plaintiff undertook to amend the defendant's office copy, a motion to set aside a subpoena requiring the defendant to appear to and answer the amended bill, was refused. *Breeze v. English*. ii. 638

6. An order made at the hearing, that the cause should stand over, with leave to amend by adding proper parties and apt words to charge them, or to show that other parties are not necessary, or to file a supplemental bill, does not entitle the plaintiff to introduce, by amendment, any charge against the original defendants, which is not necessary to explain the amendment. *Gibson v. Ingo*, v. 156

7. Where a cause is, at the hearing, ordered to stand over, with liberty to the plaintiff to amend by adding parties, and no further proceedings are taken, the proper course for the defendant is to move, upon notice, that the bill be amended within a certain time, or that it be dismissed; and not to move that it be dismissed simply. *Emerson v. Emerson*, vi. 442

8. Under an order made at the hearing of the cause, giving the plaintiff leave to

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amend his bill by adding proper parties with apt words to charge them, or by stating reasons to show why particular persons should not be parties, or to file a supplemental bill, the plaintiff may amend by making a grant of letters of administration to the estate of a deceased person to one who is already a defendant in the suit, and by expunging a statement which the bill originally contained, that the deceased person had died intestate, and had no personal representative. *Jennison v. Morpion*. vi. 341

9. Where a plaintiff has obtained an order of course to amend his bill, after one or more answers have been filed, he can obtain no further order of course to amend, although he has called for and obtained an answer to the amended bill from the defendants or defendant who had answered the original bill, and although other defendants may not have answered the original bill. *Wadding v. Murray*. vi. 150

10. If the right of the plaintiff to an order of course to amend be barred as against one defendant, it is barred against all. 11.

11. The amendment of the bill, by adding the personal representative as a party, and by introducing the disclaimer of such personal representative upon the record, will not sustain the suit of the heir-at-law. *Griffith v. Roberts*; *Griffith v. Leach*. vii. 365

AMERICAN TREATY.

See ALIEN.

ANNUAL RESTS.

See ACCOUNT.

ANNUITY.

See LEGACY—PARTIES.

It is sufficient that the memorial of an annuity, inrolled pursuant to the Act 53 Geo. 3. c. 141, should, under the head "Consideration and how paid," state the amount of the consideration, and whether paid in money, notes, or bills, as the case may be; without stating to whom the same was paid, or the fact that part of such consideration was paid to a third person in redemption of a prior incumbrance on the property. *Moody v. Hebbard*, vii. 182

ANNUITY.

See CHARGE—CHARITABLE BEQUEST—COVENANT—DEVISE—ELECTION—INTEREST OF LEGACY—INVESTMENT—LUNACY—PAYMENT OUT OF COURT—

ANNUITY.

SUBSTITUTIONAL LEGACY—VENDOR AND PURCHASER—VOLUNTARY ASSIGNMENT—WIFE.

1. The plaintiff, being entitled to an annuity of £300 charged upon plantations in the West Indies belonging to K., entered (as agent for K.) into an agreement with D., by which D., in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him D. by K. for the expenses of management, and also to pay the plaintiff's annuity. The consignments were made, and D. paid the plaintiff's annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that D. might be ordered to pay the annuity so long as he continued to receive the consignments:—*Held*, on demurrer, that, without deciding whether the plaintiff could (with reference to the decision in the case of *Garrard v. Lord Lauderdale*) sustain a suit to enforce the agreement as against D., D. could not, after the payment of the annuity which he had made under the contract, withhold from the plaintiff the benefit of the contract for the further payment of the annuity. *Kirwan v. Daniel*, v. 493

2. A bequest by the will of the testatrix of an annuity to her "servant," E. H., and a bequest by a codicil three years afterwards of an annuity of the same amount to her "servant," E. H.—*Held* to be cumulative, the word "servant" not expressing the motive, but being descriptive only. *Roch v. Callen*, vi. 531

3. Notwithstanding the principal question in the suit be the right of the plaintiff to two annuities, one of which only has been paid, the Defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the Statute of Limitations as limiting the period of the account, if the benefit of the statute be not claimed upon the pleadings. *Ib.*

4. An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. *Ib.*

5. Interest not given on the arrears of an annuity, unpaid for several years during the progress of the cause—although the suit was instituted by, and a receiver appointed on the application of, the residuary legatee—and the surplus income out of which the annuity was payable was brought into Court, and made productive. *Taylor v. Taylor*, viii. 120

6. In order to entitle an annuitant, whose annuity is payable from a fund which has been brought into Court, to any profit

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which may have been made by the investment of the arrears of his annuity, he should procure the arrears to be set apart and distinguished from the general estate. *Ib.*

7. The claim of an annuitant to interest is not affected by the circumstance that the annuity is secured by a term of years, of which he is himself trustee, if his title to the annuity, in the circumstances of the case, is one of sufficient doubt to require the direction of the Court—*Semble*. *Ib.*

8. An annuitant who has established his right to an annuity in a proceeding directed by the Court for trying such right, may immediately apply for the appropriation of the portion of the fund necessary for its payment—*Semble*. *Ib.*

9. Amongst several gifts of sums of £300 each to the grand-nephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests, as follows:—"Joseph Walker, £300 annuity for life; Martha—, £300 an annuity for life:"—*Held*, that Joseph and Martha were each entitled to annuities of £300 for life. *Walker v. Tipping*, ix. 800

10. Order providing for a contingent annuity for the life of a future wife of the son of the testator. *Aaron v. Aaron*, ix. 821

11. Interest not allowed on the arrears of an annuity, and the discretion of this Court on the question is not affected by the stat. 3 & 4 Will. 4, c. 42, s. 28. *In re Powell's Trust*, x. 134

12. The cases of *Hyde v. Price*, and *Crosse v. Bedingfield* referred to their special circumstances. *Ib.*

ANSWER.

See ADMISSION AND DISCHARGE—AFFIDAVIT—AMENDMENT—APPENDIX, vol. ix, p. lxi; vol. x, p. iii—BANKRUPT—COSTS—DEMURRER—DISCOVERY—DISMISSAL OF BILL—EVIDENCE—EXCEPTIONS—GENERAL ORDERS, 1841, August, r. XXXVII—HUSBAND AND WIFE—INJUNCTION—INTERPLEADER—INTERROGATORIES—JURAT—PAYMENT INTO COURT—PLEA—PLEADING—PRO CONFESSO.

1. The answer of a defendant not answering any of the interrogatories of the bill, and which was put in after the time for answering had expired and an order for further time had been obtained, ordered to be taken off the file. *Lynch v. Leceme*, i. 626

2. The answer of a married woman, who

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is an infant, cannot be taken either separately or jointly with her husband, until she has had a guardian assigned. *Colman v. Northcote*, ii. 147

8. The 38th Order of August, 1841, enabling a defendant by answer to decline answering any interrogatory, from answering which he might have protected himself by demurrer, applies as well where the demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only. *Tipping v. Clarke*, ii. 383

4. Construction of an answer containing a general denial of the facts charged, in the terms of the charge, with a saving so far as the other statements in the answer admits or explains them. *Ib.*

5. The defendant may, by answer, decline answering, under the 38th Order of August, 1841, although the objection to answer is not applicable to any interrogatory in particular, but is founded on the bill being demurrable. *Drake v. Drake*, ii. 647

6. One of several defendants, served with the subpoena to appear and answer, is, under the 16th Order of August, 1841, not bound to put in any answer to the bill, where he is not required to do so by the note inserted at the foot of the bill, under the 17th Order; but in default of answer by such a defendant within the time allowed for answering, the plaintiff may file a traversing note against him, under the 21st Order. *Hughes v. Lipscombe*, iii. 341

7. Under the 38th Order of August, 1841, a defendant may object to answer a bill which is demurrable, although the only ground of demurrer be that the suit is defective for want of parties. *Kaye v. Wall*, iv. 127

8. Exceptions for insufficiency were overruled, under the 38th Order of August, 1841, on the ground that the bill was defective for want of parties. The plaintiff then added the necessary parties by amendment, and the defendant answered the amendment only:—*Held*, on exceptions, that the defendant in such a case must answer, not only the interrogatories added by amendment, but those in the original bill which had not been answered. *S. C.* iv. 283

9. The answer referred to in the 13th (amended) Order of the 3rd of April, 1828, held to mean the answer to the original bill, on the ground, that, if it were construed to refer to an answer to the amended bill, there would be no limit imposed by the Order to the number of amendments, until the Court should consider them to be vexatious. *Dean v. Hickinbotham*, iv. 302

10. Suggestion by answer of a defect of

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parties, bringing the case within the 39th Order of Aug. 1841. *Biggs v. Penn*, iv. 471

11. The Order XLIII. of May, 1845, which directs that commissions to take answers are to be made returnable without delay, does not preclude the answer from being filed, although delay may in fact have occurred. *Hughes v. Williams*, v. 211

12. Mode of altering and correcting the title of an answer, which purports to be the answer of several defendants, where such answer has been sworn by some of such defendants, but the others refuse to join in it. *Thatcher v. Lambert*, v. 228

13. On the dismissal of a bill with costs, the Court referred it to the Master to inquire and state whether it was necessary or proper that several defendants, consisting of trustees and their cestui que trusts, appearing by the same solicitor, and having no conflicting interests, should have filed two separate answers to the bill. *Woods v. Woods*, v. 229

14. The effect to be given to the answer to an original bill, after such bill has been varied by amendment. *Attorney-General v. Thompson*, viii. 118

ANTICIPATION.

See HUSBAND AND WIFE—SEPARATE USE.

ANTICIPATION CLAUSE.

See APPOINTMENT.

APPEAL.

See JURISDICTION—REHEARING—STAY OF EXECUTION—STAY OF PROCEEDINGS.

APPEARANCE.

APPENDIX, vol. x, p. xxxvi.—ATTACHMENT—BILL OF REVIVOR—PLEA—PRO CONFESSO—RECEIVER—SERVICE.

1. An appearance cannot be entered for a defendant under the 8th Order of August, 1841, where the subpoena was served before the Orders of August, 1841, came into operation, and was, therefore, not served according to the 14th Order. *Gregory v. Gregson*, i. 108

2. An affidavit that the deponent has inquired of and been informed by the clerk in court, and the deponent believes it to be true, that no appearance has been entered by the defendant, is sufficient to satisfy the Court of that fact. *Tatham v. Williams*, i. 159

3. It is necessary, in applications under the 8th Order of August, 1841, that the affidavit of service of the subpoena should state that the memorandum, in the form

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prescribed by the 14th Order, was at the foot of such subpoena—*Semble*. *Ib.*

4. The Court will not make the order allowing the plaintiff to enter an appearance for the defendant, under the 8th Order of August, 1841, after several months have elapsed since the service of the subpoena unexplained, except upon notice. *Radford v. Roberts*, ii. 96

5. A defendant, against whom it is prayed that he may be bound by the proceedings on service of a copy of the bill, under the 23rd Order of August, 1841, may appear gratis before or after he is so served. *Barkley v. Lord Reay*, ii. 309

6. Form of the order for liberty to enter a conditional appearance with the Registrar since the 7th General Order of the 26th of August, 1841. *Price v. Webb*, ii. 511

7. It is not open to one defendant, on an interlocutory application, to object to the irregularity of the service of, and appearance by, another defendant, if such other defendant, having notice of the application, does not himself object on the ground of such irregularity. *Green v. Pledger*, iii. 165

8. Motion by a defendant, who had been served with a copy of the bill, under the 23rd Order of August, 1841, for leave to enter an appearance without being bound by the proceedings which had taken place in the cause, on the ground that she ought to have been made a party by subpoena, refused; for, if the defendant was not a party within the 23rd Order, she was not bound by the proceedings. *Boreham v. Bignall*, iv. 633

APPOINTMENT.

See EQUITABLE JURISDICTION—FINES ON RENEWAL—HUSBAND AND WIFE—POWER—PRELIMINARY INQUIRIES—STATUTES, CONSTRUCTION OF, 7 Will. 4 & 1 Vict. c. 26—TRUSTEE—TRUSTEE AND CESTUI QUE TRUST.

1. Trustees of a fund, having a power to appoint the same to such one or more of several objects of the power as the trustees should select, appointed the fund to trustees (of whom A., one of the objects of the power, was one), upon trusts to be declared by a subsequent deed; and by that deed, to which A. and all the trustees were parties, the trusts of the fund were declared to be for the benefit of A. for life, with remainder, in equal shares, amongst four other of the objects of the power, subject to such limitations, in respect of the interests in their respective shares, to be taken as between themselves, their wives, and issue, respectively, as A. should appoint.

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A. by will limited the share of one of the appointees to trustees for the appointee, his wife, and children,—the wife not being an (express) object of the original power:—*Held*, that the appointment was an effectual execution of the power,—being equivalent to an appointment to A., and a subsequent and independent settlement by A. of the fund which A. acquired by such appointment. *Goldsmid v. Goldsmid*, ii. 187

2. Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interests, and proceeds should be divided amongst a class, either equally or in other proportions, as the trustee, having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unmarried or unsettled, and particularly for the comfortable support of P., (one of the class), who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint, having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold and the proportions of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts which might remain unexecuted at his (the trustee's) death, and directed them to distribute the surplus proceeds of the estates amongst other objects according to their exigencies:—*Held*, that the trustee, for the government of his own discretion, might properly have regard to the directions of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P., and that the attempt to delegate powers which the trustee could not transfer did not invalidate the directions in the same deed which he had power to give. *Hitch v. Leworthy*, ii. 200

3. Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint; and in default of appointment, to their respective executors, administrators, and assigns:—*Held*, that each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the

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corpus of their shares of the fund. *Hol-
loway v. Clarkson*, ii. 521

4. Real estate was devised in 1778 to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainders between them; and in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will, that she had not any issue of her body, and that she was desirous of exercising the power subject to the life interest of her husband and herself, as thereafter mentioned, appointed that, from and after the decease of the survivor of her husband and herself, "and there being a failure of issue of her" the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns, for ever:—*Held*, that this was a good appointment of the estate under the power. *Eao v. Eao*, vi. 171

5. Two funds were settled for the benefit of a husband and wife for their respective lives, with remainder to their children, as to one fund, as the parents should appoint, and as to the other fund, in equal shares. The husband and wife resided abroad, and received the dividends through Coutts & Co., and, previously to the marriage of one of their sons, they signed a document, expressing that they thereby disposed of a certain sum "standing in the English bank of Coutts & Co." in favour of such son and his wife, and the children of the intended marriage:—*Held*, that the settled funds were sufficiently referred to by the instrument of disposition; that it did not refer exclusively to the fund subject to the power of appointment; that the son was entitled to his share of the other fund, and to have the sum mentioned in the instrument of disposition made up out of the fund subject to the appointment. *Sheffield v. Von Donop*, vii. 42

6. Where an appointment of a trust fund reserved a power of revocation, but did not reserve a power of new appointment, it was held, that, upon the exercise of the power of revocation, a new appointment might be made. *Ib.*

7. Stock, over which the testatrix had a power of appointment, held to be described and appointed by a will, in which the power was not expressly referred to. *Sayer v. Sayer; Innes v. Sayer*, vii. 377

8. On a question, whether a power has

been executed by a will, evidence of the state of the property is admissible, so far as it is material to the question, whether a particular part of such property is or is not described by the will; but, unless the circumstances of the property, when known, are found to exclude the primary and strict sense of the words which the testator has used, such strict sense must be adhered to; and the mere probability, however strong, that the words were used in a secondary sense, does not authorise the Court so to construe them. *Ib.*

9. A disposition of trust friends, over which the testatrix had a general power of appointment, not pursuing the formalities prescribed in the power, held to be, nevertheless, a good appointment in favour of a charity. *Ib.*

10. Under a power to charge an estate with a sum not exceeding £1,000, for the portion or portions of a younger child or younger children, the donee of the power appointed the £1,000 to a married daughter for her separate use, with a restraint upon anticipation during the coverture; and it was held, that the interest of the appointee might lawfully be so restricted by the terms of the appointment. *Dickinson v. Mort*, viii. 178

11. The Court will not entertain a suit to set aside an appointment of a part of certain trust funds as a fraud upon the power, when it appears that another appointment, not impeached by the bill, was made of funds subject to the same power, in which regard was had to the appointment complained of, and the object was to equalise the interests of the several appointees; for the Court will not undo part of an entire transaction, the other parts of the same transaction not being brought within its jurisdiction. *Harrison v. Randall*, ix. 397

12. Where there is an appointment to A. and B. by one instrument, (and a fortiori by different instruments), the appointment to A. may be good, and the appointment to B. bad, and A. and B. may well agree between themselves that the bad appointment shall not be disturbed. *Ib.*

13. Certain policies of assurance effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father should appoint; and certain estates were demised to the same trustee, upon trust, out of the rents and profits, to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters; and the

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three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums; and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made, in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—*Held*, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee in enforcing the rights of the daughters against the father; and that the application of the trust funds in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust, for which he was responsible to the objects of the power. *Ib.*

14. Effect of an agreement between several appointees under different appointments, as between such appointees and the trustees of the property, that one of the appointments, which is invalid, shall not be disturbed. *S. C.*, ix. 409

15. A testatrix, having a power of appointing a sum of £10,000 secured by a term of five hundred years, and having also a power of appointing the fee of the lands on which the money was secured, by her will devised her lands to A. for life, with remainder to B. in tail, and gave to A. all the residue of her personal estate:—*Held*, that the £10,000 passed under the residuary gift of the personal estate. *Clifford v. Clifford*, ix. 675

16. By a marriage settlement, monies in the funds, monies lent on mortgage, and other property, were assigned to trustees, upon trust, to pay and transfer the same unto such persons, for such estates or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, and under and subject to such powers, provisos, &c., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife, notwithstanding her coverture, at any time or times, and from time to time during the joint lives of herself and her husband, should, by and with the consent and approbation of her husband, testified in writing under his hand and seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed and delivered by her in the presence of and attested by two or more witnesses, direct or appoint, and in default of such direction or appointment, and in the meantime and until such direc-

tion or appointment should be made and executed, and subject thereto, and as to so much of the said trust monies, &c., whereof no such direction or appointment should be made, upon trust, to receive the annual proceeds due and to grow due for or in respect of the same, and pay the same to such persons as the wife, during her life, notwithstanding her coverture, and whether sole or covert, should from time to time, by any writing or writings under her hand, direct or appoint to receive the same, and in default of such direction or appointment, into the proper hands of the wife for her separate use. The monies in the funds were transferred to the husband by virtue of powers of attorney under the hand and seal of the wife, with the consent of the husband under his hand and seal, and attested by two witnesses; and the mortgage money was received, and a receipt given by the husband and wife, and the premises reconveyed, and the receipt and reconveyance also so attested.

Held, that the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, and only enabled the bankers to do for her what she might have done for herself without their intervention. That, as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney; and that the transfers made subsequently to such execution, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, and could not operate as executions of the power of appointment. *Hughes v. Wells*, ix. 749

17. That the wife had no power to dispose of the trust funds otherwise than by a perfect appointment. *Ib.*

18. That, in order to constitute a purchaser in whose favour a defective execution of a power will be aided in equity, there must be a consideration and an intention to purchase, either proved or to be presumed; and the maintenance of his household and establishment by the husband does not furnish such consideration to the wife. *Ib.*

19. That, if the transfer of a wife's legacy to herself by the husband be a consideration, it does not show any intention to purchase. *Ib.*

APPOINTMENT OF TRUSTEES.

See TRUSTEE AND CESTUI QUE TRUST.

APPORTIONMENT.

APPORTIONMENT.

See HUSBAND AND WIFE—STATUTES, CONSTRUCTION OF, 4 & 5 Will. 4, c. 22.

1. Apportioning a charge on stock between the life-interest in possession and the reversion expectant on the decease of the tenant for life. *Bristed v. Wilkins*.

iii. 240

2. Apportionment of debt rateably on the legatees who were defendants, and the legatees who were not parties. *Hall v. Palmer*,

iii. 538

3. An annuity given for maintenance, and charged upon land for a certain time which ceased before the time of the year at which the annuity was payable: the annuitant was held entitled to an apportioned part of such annuity for the time between the last payment and the cessation of the charge. *Sheppard v. Wilson*,

iv. 395

4. An annuity bequeathed by will, and directed to be paid out of a moiety of the rents, issues, profits, dividends, interest, and proceeds of the real and personal estate of the testator, after the expiration of a life-interest therein:—*Held*, not to be primarily payable out of the personal estate of the testator, but to be apportionable between the real and personal estates. *Falkner v. Grace*,

ix. 282

5. A legacy directed by an appointment in pursuance of a will to be raised by mortgage of the moiety of the residuary real and personal estate, on the expiration of a life-interest in such moiety, and the residue of such legacy and another legacy directed to be raised and paid by mortgage or sale of the whole or any part of the real and personal estate, on the expiration of another life-interest:—*Held* not to be charges primarily payable out of the personal estate, but to be apportionable between the real and personal estate. *Ib.*

6. On the apportionment of charges between real and personal estate, the respective values of such real and personal estate are to be taken as they are when the apportionment is made, and not on such values at any anterior time. *Robinson v. Governors of the London Hospital*,

x. 29

APPORTIONMENT OF LEGACIES AND CHARGES.

See MARSHALLING.

APPORTIONMENT OF POWERS.

See POWER.

APPORTIONMENT OF RESIDUE.

See LEGACY.

ARTICLES BEFORE MARRIAGE.

APPRENTICE FEE.

See PORTBROS.

APPROPRIATED CAPITAL.

See JOINT-STOCK COMPANY.

APPROPRIATED OR UNADMINISTERED ASSETS.

See ADMINISTRATION SCIT.

APPROPRIATION.

See ADMINISTRATION SCIT—ANNUITY—ASSIGNMENT—COSTS—EXECUTOR—INVESTMENT—PRINCIPAL AND SECRET.

APPROVAL OF PURCHASES AND TITLES.

See APPENDIX, vol. ix, p. ix: vol. x, p. xxxvi.

ARBITRATOR.

See AWARD—JURISDICTION.

ARREARS.

See ANNUITY—DOWER.

ARREARS OF ANNUITY.

See STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27, s. 42.

ARREST.

See APPENDIX, vol. x, p. ii—PRIVILEGE.

Cases in which the Court, upon ordering the discharge of a party from his arrest, will impose upon him the condition that he shall bring no action in respect of the arrest. *Newton v. Asker*,

vi. 324

ARTICLES BEFORE MARRIAGE.

1. On the proposed marriage of the infant daughter of one who was non compos mentis, a petition was presented to the Lord Chancellor, under the stat. 4 Geo. 4, c. 76, s. 17, for his consent, in order to obtain a license. The petition was referred to the Master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The Master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor, but shortly afterwards married, under the Act 6 & 7 Will. 4, c. 85, without license. The settlement

ARTICLES BEFORE MARRIAGE.

mentioned in the affidavit was not made,—the parties having entered into articles for a different settlement:—*Held*, that the proposal laid before the Master amounted to a contract, which, in the absence of any settlement properly substituted for it, the Court would enforce. *Cook v. Fryer*, i. 498

2. *Semble*, it was not incompetent to the parties before the marriage to vary *bonâ fide* the terms of the contract, notwithstanding it had been approved by the Court. *Ib.*

ASSENT.

See EXECUTOR—PRIORITY OF CHARGE.

ASSESSMENT.

See TITHES.

ASSETS.

See ACCOUNT—ADMINISTRATION SUIT—EVIDENCE—EXECUTOR—LETTERS OF ADMINISTRATION—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 104.

ASSIGNEE.

See BANKRUPT—COSTS—EQUITABLE SET-OFF—HEARING—HUSBAND AND WIFE—INSOLVENT DEBTOR—PARTIES—WITNESS.

1. Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditors' assignees for the sale of the bankrupt's property, such contracts not being in breach of their trust. *Hughes v. Morris*, ix. 636

2. The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the Court to refuse specific performance of the contract. *Ib.*

3. The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee. *Ib.*

ASSIGNMENT.

See AGREEMENT—ALIENATION—EVIDENCE—EXECUTOR—FORFEITURE—HUSBAND AND WIFE—INJUNCTION—INSOLVENT DEBTOR—LESSOR'S TITLE—NOTICE—PARTIES—PARTNERSHIP—PRIORITY—VENDOR AND PURCHASER.

1. Assignment of funds by a prisoner on

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a charge of felony, to secure payment of an antecedent debt and costs to be incurred in his defence, established, notwithstanding his subsequent conviction. *Perkins v. Bradley*, i. 219

2. A deed of assignment by way of mortgage of a ship, together with her tackle and appurtenances, and all oil, head-matter, and other cargo, which might be caught or brought home in such ship, is, as against the assignor, a valid assignment in equity, as well of the future cargo to be taken during the particular voyage, as of the cargo (if any) which existed at the time of the assignment. *Langton v. Horton*, i. 549

3. The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees immediately after her return from the voyage:—*Held*, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of *fi. fa.* and proceeded to take the ship and cargo in execution. *Ib.*

4. A., in India, being indebted to B. in England, directed C. & Co., his agents in London, to hold a sum (equal to a lac of rupees) at the disposal of B., as soon as C. & Co. should be in possession of funds, and informed B. of such directions: C. & Co. also acquainted B. that they had received and registered the order. A. subsequently consigned a ship to another agent, D., and directed him to apply the proceeds of the sale of the ship to the purpose of paying the debt owing to B., and spontaneously informed B. that the ship and freight would be available for his (A.'s) London accounts, and that B., amongst others, would be paid the lac of rupees thereout:—*Held*, that B. had not by the correspondence, upon which the plaintiff's case depended, acquired a lien on the proceeds of the ship, and that it was competent to A. to countermand the order to his agents as to the application of such proceeds to the payment of B. *Malcolm v. Scott*, iii. 39

5. A Calcutta firm, by a letter dated in January, and received in London on the 11th March, 1841, directed their London correspondents to hold a sum of money (equal to a lac of rupees, at the current rate of exchange) payable on the 19th November following, out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool

ASSIGNMENT.

house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and, after stating that they were in advance of the Calcutta house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house also, in acknowledging to the Calcutta house the receipt of the order, said, that the state of their accounts did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so before November. The Calcutta house revoked the order, by a letter of January, 1842, received by the London house on the 12th March, 1842:—*Held*, that the effect of the triple correspondence between the Calcutta house and the London house, the Calcutta house and the Liverpool house, and the London house and the Liverpool house, entitled the Liverpool house, as against the London house, to an account in equity of the balance on 12th March, 1841, on their general account with the Calcutta house (giving the London house credit, in such account, for all liabilities incurred by them on behalf of the Calcutta house on that day), and of the consignments and remittances of the Calcutta house to the London house in the general account, which came to the hands of the latter between the 12th March, 1841, and the 12th March, 1842. *Malcolm v. Scott*, vi. 570

6. The London house might have declined the appropriation, and returned the balance of the account to the Calcutta house; but they could not, as against the Calcutta house, have retained any balance due to the Calcutta house, except for the purpose which the latter had directed. *Ib.*

7. *Semble*, that the London house was not merely bound to pay to the Liverpool house the amount directed, so far as the balance of account on the 19th November, 1841, enabled them to do so, but was bound to appropriate all the remittances and consignments from the Calcutta house on general account, from the receipt until the revocation of the order, after reimbursing themselves in respect of their advances and liabilities on behalf of the Calcutta house at the time they received it. *Ib.*

8. *Semble*, that the communications between the Calcutta house and the London house, and the Calcutta house and their Liverpool creditor, would not have entitled the latter firm to the account as against the London house, without the communications which took place between the London and the Liverpool firms. *Ib.*

AWARD.

ASSUMPSIT.

See ACCOUNT.

ATTACHMENT.

See ANSWER—COSTS—PRISONER.

1. The 8th Order of August, 1841, is not imperative; a plaintiff may, notwithstanding, proceed, according to the old practice, to enforce appearance by attachment. *Collins v. Brown*, i. 315

2. Lord Clarendon's General Order, that, after a contempt duly prosecuted to an attachment with proclamations returned, no plea or demurrer shall be admitted but upon motion in Court, does not apply to the process at present substituted for attachment with proclamations—*Semble*. *Robinson v. Stanford*, ii. 149

3. A party in a cause who has obtained and served, according to the 12th Amended Order of August, 1841, an order that his solicitor shall deliver his bill of costs within a month, which is disobeyed, is entitled, under the 15th Order of August, 1841, to enforce obedience by the writ of attachment. *Lane v. Oliver*, ii. 97

ATTESTATION OF WILL.

See LEGACY.

ATTORNEY.

See ADMINISTRATION—SOLICITOR—SUBSTITUTED SERVICE.

ATTORNEY AND CLIENT.

See DISCOVERY, 1.

ATTORNEY-GENERAL.

See CHARITY—CHARITY ESTATE—COSTS—PLEADING.

ATTORNMENT.

See SEQUESTRATION.

AUCTIONEER.

See AGENT—VENDOR AND PURCHASER.

AUDITA QUERELA.

See JURISDICTION.

AWARD.

See MOTION—STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18, s. 85.

1. An award, as between partners, providing for the application of the partner-

AWARD.

ship assets if there should be a surplus, but not providing for the event of a deficiency, is not necessarily invalid: for the Court, in support of the award, may, in a proper case, intend that the state of the assets is such as to render the latter provision unnecessary. *Wilkinson v. Page*, i. 276

2. An award, in other respects valid, is not rendered invalid, owing to the nature of the remedy to which the parties are left in order to enforce obedience to the award, provided the remedy be sufficient. *Ib.*

3. An award (under an order of reference in a cause seeking an account) directing accounts in question between the parties to be taken, without ordering payment of the balance which shall be found due, is not, therefore, bad; for the Court may enforce payment of such balance in the cause. *Ib.*

4. A sum of money, constituting an item in an account, being one of the matters in reference, the arbitrator directed the accounts to be taken, and the sum in question to be paid at a certain time, without reference to the state of the accounts at that time:—*Semble*, this does not necessarily affect the validity of the award. *Ib.*

5. Among the matters referred to an arbitrator, was the question, whether W. or P. ought to be ultimately liable upon a promissory note, of which P. was the maker, and W. an indorsee, as surety for P.; and whether P. was entitled to an indemnity from W. against the liability of P. to pay the note when it became due? The arbitrator, by his award, among other things, declared that the liabilities of P. on the note, as between P. and W., should remain unaffected by the award:—*Held*, that the award was not final, and was therefore bad. *Ib.*

6. The submission to arbitration may, under the statute 9 & 10 Will. 3, c. 15, be made a rule of Court, not only after the award has been made, but after the last day of the term following the publication of the award; and when, therefore, it is no longer open to either party to complain of the award on the ground of corruption or undue practice. *Heming v. Swinnerton*, v. 350

7. An objection to the validity of an award, apparent upon the award, is not an objection to making the submission a rule of Court under the statute. *Ib.*

8. A motion to make a submission to arbitration a rule of Court under the statute may be made *ex parte*—*Semble*. *Ib.*

9. Commissioners appointed under an Act of Parliament, to set out the metes and bounds of mines and quarries in the Forest of Dean, and to fix the rent to be paid for the same, *held*, under the terms of the Act,

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to have no power to compel a miner to pay, in money, for by-gone workings, or to exclude him from the award if he refused to make such payment. *Attorney-General v. Jackson*, v. 355

10. Commissioners appointed by an Act of Parliament to determine the respective rights of the Crown and the customary miners on Crown lands, had made an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, and which the miner did not afterwards fulfil:—*Held*, that, after the time limited by the Act for making the award had expired, the Court would not set aside the award at the suit of the Crown, as it could not then restore the miner to his rights under the Act. *Ib.*

11. In the case of an award made upon the faith of a parol contract, entered into by a party taking a benefit under the award, that such party would pay a sum of money to the Crown, an information by the Crown seeking specific performance of the parol contract, and thereby, in effect, to add the parol agreement to the award,—cannot be sustained. *Ib.*

12. *Semble*—The refusal to pay a sum of money according to an agreement, upon the faith of which an award was made, although it was a stipulation which the commissioners making the award were not empowered to insist upon,—would be a ground upon which in equity the party to whom the monies were to have been paid might resist the performance of the award, if the other party had sought the aid of the Court to enforce it. *S. C.* v. 365

BAILIFF.

See INFANT.

BANK OF ENGLAND.

See COSTS—STATUTES, CONSTRUCTION OF, 1 & 2 Vict. c. 110, ss. 14, 15.

The Bank of England ought not to be made a party to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict. *Perkins v. Bradley*, i. 219

BANKERS.

See TRUSTEE AND CESTUI QUE TRUST.

BANKRUPT.

See ASSIGNEE—COSTS—HEARING—INTERPLEADER—STATUTES, CONSTRUCTION OF, 13 Eliz. c. 5—TRUSTEE AND CESTUI QUE TRUST—WITNESS.

1. The disclaimer by the assignees of a

BANKRUPT.

bankrupt of the equity of redemption of a term of years, vested in the bankrupt by the devise to him of the fee-simple of the same estate, renders the bankrupt a necessary party to a bill of foreclosure—*Semble. Singleton v. Cox*, iv. 326

2. Where a defendant becomes bankrupt before he has answered the bill, and a supplemental bill is filed by the plaintiff against the assignees of the bankrupt defendant, stating the bankruptcy, it is not proper for the plaintiff, after filing such supplemental bill, to issue process to compel the bankrupt himself to answer the original bill. It is the same where both the plaintiff and defendant become bankrupt before the defendant has answered the bill, and the supplemental bill is filed by the assignees of the plaintiff against the assignees of the defendant. The clerk of record and writs will, in such cases, give the usual certificate for setting down the cause, without any answer from the bankrupt being on the file. *Robertson v. Southgate*, v. 223

3. Where a defendant becomes bankrupt after the institution of the suit, and his assignees are made parties by supplemental bill, it is not necessary to bring the bankrupt to the hearing, by serving him with the subpoena to hear judgment. *Stahlschmidt v. Lett*, v. 595

BANKRUPTCY.

See ALIENATION—DISMISSAL—HUSBAND AND WIFE—JOINT TENANCY—JURISDICTION—OFFICIAL ASSIGNEE—POLICY OF INSURANCE—TRUSTEE AND CESTUI QUE TRUST.

1. A joint fiat in bankruptcy was issued against two partners, pending a suit by one of them against the other and a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for repayment of the monies which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and they proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee and the retired partner were defendants:—*Held*, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner who was an original defendant against whom relief was sought, could not sustain the suit against

BILL OF DISCOVERY.

the retired partner. *Robertson v. Southgate*, vi. 536

2. *Semble*, that, in such a case, the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit. *Ib.*

3. *Quere*, whether, if it had appeared in evidence in the suit, that the defendant, the retired partner, was alone, or otherwise, answerable for the fraud, the Court could, in such a case, have made a conditional decree, imposing terms upon the plaintiffs, as representing the bankrupt, who was originally charged as defendant. *Ib.*

BARON AND FEME.

See ARTICLES BEFORE MARRIAGE—HUSBAND AND WIFE.

BAPTISTS.

See TRUSTEE AND CESTUI QUE TRUST.

BEQUEST TO DECEASED CHILD.

See STATUTES, CONSTRUCTION OF, 7 Will. 4 & 1 Vict. c. 26

BIDDER AT SALE.

See VENDOR AND PURCHASER.

BIDDINGS.

No order will be made to open biddings until the report of the purchase has been made. *Lovegrove v. Cooper*, ix. 279

BILL.

See AMENDMENT—APPENDIX, vol. ix, p. lxxv — INFANT — INTERROGATORIES — PLEADING — REVIVOR — SUBSTITUTED SERVICE—SUPPLEMENT.

It is not necessary to serve an office copy of the bill upon a party to the suit under the 23rd Order of August, 1841, in order that he may be bound by the proceedings in the cause. An examined copy of the bill is sufficient. *Blew v. Martin*, i. 150

BILL AND ANSWER.

See EVIDENCE.

BILL OF DISCOVERY.

See APPENDIX, vol. ix, p. lxxv—COSTS—DISCOVERY.

BILL OF EXCHANGE.

BILL OF EXCHANGE.

See TRUSTEE AND CESTUI QUE TRUST.

1. The acceptor of a bill of exchange, who had by the hands of the drawer as his agent, paid the amount of the bill after it became due to an indorsee for value, without procuring it to be delivered up, filed his bill against such indorsee for value and a subsequent indorsee, charging, that the indorsee to whom the payment had been made had afterwards indorsed the bill to the other defendant without consideration, in order to recover the money from the plaintiff a second time, and praying that an action commenced against him for the amount might be restrained, and the bill delivered up to be cancelled. Demurrer,—for want of the drawer as a party to the suit—overruled. *Earle v. Holt*, v. 180

2. A. accepted a bill of exchange for £150 drawn by and for the accommodation of B. B. indorsed the bill, and then, in order to facilitate its being discounted, procured C. to indorse it. B. subsequently, and before it became due, delivered the bill to a person who advanced him £100 upon it. When the bill became due, the holder demanded payment of the £100 from C., and C. some weeks afterwards took up the bill by giving the holder a new bill of exchange for £100; and the holder then paid him a further sum of £50, in addition to the £100 he had formerly paid to B. C. brought his action against A. upon the bill, and B. filed his bill to restrain the action, and have the bill delivered up. The common injunction was obtained, but was dissolved on the merits, and C. recovered judgment in the action. At the hearing, the bill was dismissed for want of equity, with costs. *Hammon v. Sedgwick*, vi. 256

BILL IN PARLIAMENT.

See TRUSTEE AND CESTUI QUE TRUST.

BILL OF REVIVOR.

See DEMURRER—PLEADING.

The fact that an appearance has been entered by the plaintiff for the defendant to an original bill, under the 8th Order of August, 1841, or that an original bill has been taken pro confesso against a defendant under the 1st Order of April, 1842, is no ground for taking either of those steps on a mere bill of revivor in the same suit against such defendant, without previously going through all the preliminary steps, as in the case of an original bill. *Elloft v. Brown*, ii. 622

BREACH OF TRUST.

BILL OF SALE.

See EVIDENCE.

BILL TO PERPETUATE TESTIMONY.

Where depositions, taken in a suit to perpetuate testimony, are required to be used in a trial at law not under the control of the Court, the order is, that the depositions be published, and that the officer attend with and produce to the Court of law the record of the whole proceedings, and that the parties may make such use of the same as by law they can. *Attorney-General v. Ray*, ii. 518

BOARDERS.

See GRAMMAR SCHOOL.

BOND.

See CONSIDERATION—EQUITABLE SET-OFF — EXECUTOR — STATUTES, CONSTRUCTION OF, 8 & 9 *Vict.* c. 18, s. 85.

BOND DEBT.

See CREDITORS' SUIT.

BOOKS AND DOCUMENTS.

See PARTNERSHIP—PLEA.

BOROUGH.

See STATUTES, CONSTRUCTION OF, 8 & 9 *Vict.* c. 18.

BOTTOMRY.

See SHIP.

BOUNDARY.

See CHARITABLE TRUST—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

BREACH OF COVENANT AFTER DEATH OF COVENANTOR.

See COVENANT.

BREACH OF INJUNCTION.

See INJUNCTION.

BREACH OF TRUST.

See ACQUIESCENCE—PARTIES—PRIORITY OF INCUMBRANCERS — TRUSTEE AND CESTUI QUE TRUST.

BRICK BURNING.

BRICK BURNING.

See NUISANCE.

BRITISH-BORN SUBJECT.

See ALIEN.

BROKER.

1. Brokers, in the city of London, being directed to purchase iron, delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron, other than one of the firm of brokers, who intended himself to perform the contract; and upon a bill filed by parties from whom the buyer of the iron had obtained money on the security of the contracts, the deposits were ordered to be repaid, with interest. *Wilson v. Short*, vi. 366

2. If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; but the cancellation of certain letters which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits. *Ib.*

3. If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity. *Ib.*

4. Knowledge by the buyer of the fact that there was not any seller of the iron other than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers, that the contract was regular and valid, nor deprive such parties of their right of rescinding the transaction, and recovering payments which had been made. *Ib.*

5. There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation, that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Ib.*

CHAMPERTY.

BUILDING SOCIETY.

The plaintiff became a member of, and purchased twelve shares and a-half in a building society, constituted under the statute 6 & 7 Will. 4, c. 32, and the society advanced a sum of £750 in respect of such shares, upon a conveyance of certain property to the trustees of the society by way of mortgage. According to the rules of the society, 10s. per month subscription, and 4s. per month redemption monies, were payable on each share, until a sum of £120 per share should be realised for the non-purchasing members. On a bill against the trustees for redemption:—*Held*, that, upon the terms of the mortgage-deed and the rules of the society, the plaintiff was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society; the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due. *Mosley v. Baker*, vi. 87

BYE-LAWS.

See CUSTOM.

CANAL NAVIGATION SHARES.

See CHARITY.

CASES AND OPINIONS.

See PRODUCTION OF DOCUMENTS.

CATHEDRAL.

See DEAN AND CHAPTER.

CERTIFICATE.

See COMMISSION.

CERTIFICATE OF SHIP REGISTRY.

See SHIP.

CESSER.

See LIMITATION OVER.

CHAMPERTY.

See SPECIFIC PERFORMANCE.

1. Though the Court will not enforce a contract for the purchase of a litigated right, yet if a lawful contract for the purchase of an undisputed right be made, and the necessity for litigation as against third persons arise out of circumstances afterwards discovered, the purchaser or assignee is not precluded from suing upon his con-

CHAMPERTY.

tract. It is not champerty where the right purchased was originally clear, but the litigation is the result of circumstances subsequently arising or subsequently known. *Wilson v. Short*, vi. 366

2. An agreement may amount to champerty or maintenance, or savour of champerty, though made between persons not standing in the relation of solicitor and client, or in any analogous relation; and such an agreement, if not amounting strictly to champerty or maintenance, so as to constitute a punishable offence, may still be against the policy of the law, and mischievous, and such as a Court of equity ought to discourage and relieve against. *Reynell v. Sprye*, viii. 274

CHANCELLOR OF EXCHEQUER.

See CHARITABLE USE.

CHARGE.

See MARSHALLING—MERGER—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27—TENANT FOR LIFE—TENANT FOR LIFE AND REMAINDERMAN.

1. The testator devised his estate to a trustee upon certain uses, and directed him to raise, by sale of the timber and other trees growing thereon, £1,000, which he bequeathed to the plaintiff, to be paid at his age of twenty-four, without interest in the meantime; and after giving other pecuniary legacies, the testator bequeathed the residue of his personal estate, *subject* to the payment of his legacies, debts, funeral and testamentary expenses, to certain legatees therein named:—*Held*, on demurrer by the executor to a bill by the plaintiff to have the legacy of £1,000 raised by sale of the timber, and, if the same should be insufficient, out of the personal estate, that the legacy of £1,000 was not charged upon the personal estate. *Dickin v. Edwards*, iv. 273

2. By a marriage settlement in 1779, lands were conveyed to the use of the husband (the settlor) for life; remainder to the wife for life; remainder to the children, as they or the survivor should appoint; and, in default of appointment, to the heirs of the body of the wife by the husband; and, in default of such issue, the lands to stand charged with a sum of £2,000 to the wife's father, his heirs and assigns. In 1798, the husband and wife, by a deed reciting the first deed, that there was no issue of the marriage, and that they intended to bar all the estates and provisions in the former settlement, and to settle the lands to new uses thereby declared, covenanted to levy a fine for that purpose, to enure to

CHARGE.

such uses as they should appoint; and, in default of such appointment, to the use of the husband for life; remainder to trustees for a term of years; remainder to the wife for life; and, after the decease of both, to the use of the heirs and assigns of the husband. And, as to the term, upon trust to raise £2,000, and pay the same to the wife, or as she should appoint, and, in case of her death without appointment, to her next of kin. The fine did not bar the first charge. On a bill by the representative of the wife's father, who was also one of the next of kin of the wife (after the death of the husband and wife without issue or appointment), to procure both sums of £2,000 to be raised out of the settled lands:—*Held*, that, notwithstanding the recital, in the deed of 1798, of the intention of the parties, that the first charge of £2,000 should be extinguished, and although such charge still remained, yet the trusts of the term for raising the second charge of £2,000 were not, therefore, inoperative, but the same must still be carried into execution; and that both sums of £2,000 must therefore be raised. *Farr v. Sheriffe*; *Dykes v. Farr*, iv. 512

3. The lessee for years of tenements, part of a manor held under a lease from tenants of the manor, who were trustees of a charity, by which the lessee had covenanted to pay the fines and expenses which should be incurred from time to time during the term, in filling up the number of trustees when reduced to five, with a proviso for re-entry by the lessors in case the fines should not be paid by the lessee. The lessee devised the leasehold estate and other leasehold property, and shares, stocks, funds, and securities, and all other her personal estate, to trustees for her two nieces, for their lives, with remainder to their respective children, and remainders over. The number of trustees became reduced to five shortly before the death of the lessee, and became again reduced to five some years afterwards. Litigation with the lord of the manor commenced in the life of the lessee, and was continued after her decease as to the amount of the fines: the dispute was ultimately compromised by the payment of a sum by the devisee of the leasehold estate, in respect of each renewal and of certain costs:—*Held*, that the fine payable in respect of the admission of the trustees, which became necessary in the life of the testatrix, to fill up the number, and the costs of the litigation in respect of such fine, were payable out of the general personal estate of the testatrix, exclusive of the leaseholds; and that the fine which became payable for filling up the number of trustees when

CHARGE.

it became necessary to do so after the death of the testatrix, were payable by the devisees of the particular leasehold estate, and not by the general personal estate. *Fitzwilliams v. Kelly*, x. 266

4. An estate was devised to the eldest son of the testator, in fee, charged with four portions of £5,000 each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of £5,000, and release the estate therefrom. He paid off one sum of £5,000, and died intestate:—*Held*, that the husband was not a purchaser under the settlement, and that the covenant in the settlement could not be taken to have been for indemnity only; but that, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and that he had also made them his debt as between his real and personal representatives. *Barham v. The Earl of Clarendon*, x. 126

5. When a man covenants upon his marriage to lay out money in the purchase of land, and to settle the land when purchased in favour of his wife and children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife and children, but in favour of the heir also; and the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor. *Ib.*

6. Where certain annuities and an annual allowance were directed to be raised out of the annual rents and profits of an estate, and paid and applied for the uses of the daughters of the testator, and the surplus of the said rents and profits to be accumulated for twenty-one years, or until sums of £40,000 and £100,000 should be raised and invested, when the annuities and allowance should cease:—it was *held*, that the annuities and allowance were not charges on the corpus of the estate; but that the arrears of such annuities and allowance, which the rents and profits during the twenty-one years had been insufficient to pay, ought to be raised and paid out of the rents and profits accruing after the expiration of the twenty-one years. *Forbes v. Richardson*, xi. 354

CHARGE OF DEBTS.

See COVENANT—TRUSTEE AND CESTUI QUE TRUST.

CHARGE ON RAILWAY DEPOSITS.

See JOINT STOCK COMPANY.

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CHARITABLE BEQUEST.

CHARGING ORDER.

See STATUTES, CONSTRUCTION OF, 1 & 2
Vict. c. 110, ss. 14, 15.

CHARITABLE BEQUEST.

1. Bequest of stock to the "Society for Bettering the Condition of the Poor," upon trust to apply the income in the payment of the house-rent of seven or more country labourers in the principality of Wales, selected in a certain manner; and bequest of other stock to the "Society for the Encouragement of Female Servants," upon trust to distribute the income annually in gratuities to servants in the same principality, selected in a certain manner. The two societies renounced the respective trusts, and disclaimed the legacies:—*Held*, that the discretion of the trustees was not, in these cases, of the essence of the trust; that the trust being originally created for certain definite objects, and not a gift to charity generally or indefinitely, it was not a case in which the disposition of the fund required the authority of the sign manual; and that the Court would carry the trust into effect by means of a scheme. *Reeve v. Attorney-General*, iii. 191

2. A bequest of a legacy to trustees "upon trust to pay, divide, or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions, or purposes, having regard to the glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit," construed to be a gift for religious purposes, and restricted to such purposes. *Townsend v. Carus*, iii. 257

3. A bequest for a religious purpose is a valid charitable bequest, although the paramount religious object might, possibly, be effected by an application of part of the fund to a purpose which, separately taken, would not be strictly charitable. *Ib.*

4. A direction by will to pay into a certain bank "a yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward by the late Edward Irving, who may be persecuted, aggrieved, or in poverty, for preaching or upholding those doctrines; or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman-street:—*Held*, to be a valid charitable bequest of a perpetual annuity. *Attorney-General v. Lawes*, viii. 32

5. It is not necessary, to constitute a good charitable bequest, that the objects to be benefited must be shown to be of neces-

CHARITABLE BEQUEST.

sity a permanent and enduring class; for, if the objects should fail, the Court may administer the charity *cy près*. *Ib.*

6. A bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, *held* to be valid so far as related to the pure personalty, but void in respect of the personalty savouring of realty. *Nightingale v. Goulburn*, v. 484

7. The testatrix directed her executors to apply such part of her residuary estate as by law might be legally applied to such purposes, in the endowment of district churches or chapels in populous parishes, in order that the poor might have the Gospel preached to them in this country, adding, that she wished a preference to be given to the parishes of which the churches were under the patronage of certain trustees:—*Held*, that the bequest created a trust for the endowment of churches and chapels already in existence, and also of churches or chapels thereafter to be built, whether upon sites already in mortmain, or which might thereafter be acquired and brought into mortmain. *Edwards v. Hall*, xi. 1

8. That the words "endowment of district churches or chapels" meant, not an endowment by the purchase of land, nor an endowment by the building or repair of the fabrics of churches or chapels, but by making a provision for persons connected therewith or officiating therein. *Ib.*

9. A bequest of a fund for building a school, almshouse, or other charitable institution, not expressing that it is to be erected on land already in mortmain, or not otherwise excluding the necessity of acquiring land for the purpose of carrying out the trust, is construed as in effect a direction to purchase land, and is void under the statute 9 Geo. 2, c. 36; but if it be not in any event necessary in the execution of the trust which the bequest attempts to create, that land should be purchased and brought into mortmain, and the trustee has the option of performing the trust without that consequence, the bequest is not within the statute, and is valid. *Ib.*

10. Consideration of bequests which, although they do not create trusts for the purchase of land to charitable uses, yet do attempt to create trusts which cannot be performed unless land be brought into mortmain by other means, and which are therefore inducements to such disposition of land, and have been held to amount to a fraud upon or an evasion of the statute. *Ib.*

11. A bequest of shares in a Canal Na-
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CHARITABLE TRUST OR USE.

vigation Company for charitable uses, *held* to be good; but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the company, created by assignment thereof by way of mortgage, as being a charge upon land—*held* to be void, under the statute 9 Geo. 2, c. 36. *In re Maria Langham*, x. 446

CHARITABLE TRUST OR USE.

See STATUTES, CONSTRUCTION OF, 9 Geo. 2, c. 36.

1. A., being a lessee of lands under a charity, and being also the owner of an adjoining public-house and premises, was, in 1794, appointed a trustee of the charity, and, jointly with the other trustees, took a conveyance of the charity estates. A., in 1817, after the expiration of his lease, took another lease for twenty-one years of lands of the charity, which were described as part of a room in the public-house, but were not otherwise defined. A. subsequently sold the public-house to the defendants B. and C., and died; and B. and C., in July, 1823, took a conveyance and assignment of the freehold premises and the lease, from the executors of A. In 1832, B. became a trustee and executed the deed of trust, in which the whole of the room in the public-house, and other parts of the premises, were described as the property of the charity. In May, 1843, the information was filed, at the suit of the trustees other than B., claiming rent in respect of the whole of the room in the public-house, and other parts of the premises, as being the property of the charity, in the occupation of the defendants; and praying that the defendants might be decreed to convey the lands in question to the trustees of the charity:—*Held*, that the defendant B., being one of the trustees of the charity estate, the suit could be sustained against B. and C., notwithstanding the other trustees might be able to proceed at law by ejectment. *Attorney-General v. Flint*, iv. 147

2. That, so far as the case was one of trust, it was one of express trust within the sect. 25 of the statute 3 & 4 Will. 4, c. 97, and, therefore, the information having been filed within twenty years after the conveyance was executed to the defendants B. and C., the statute was not a bar to the suit. *Ib.*

3. That B. and C., having notice of the title of the charity to a part of the room not particularly specified or defined by metes and bounds, could not insist on being purchasers for value without notice of any part of such room; and, inasmuch

CHARITABLE TRUST OR USE.

as B. and C. had not proved that they had acquired the legal estate in the other parts of the premises claimed by the charity, and the equitable interest of the charity, if any, was prior to that of the defendants, it was not a case in which the defendants could rely on the defence of a purchase for value without notice. *Ib.*

4. The Attorney-General and plaintiffs being entitled, as against B., one of the tenants in common in possession of the property claimed on behalf of the charity, to an issue to try the right of the charity to the lands in question, the other tenant in common was held to be a proper party to the suit and to the issue. *Ib.*

5. A trust to "endow" a church, school, almshouse, or other charitable institution, would not be executed by the application of any portion of the fund in building; but whether a trust to "establish" such an institution would include the building—*Quære. Edwards v. Hall*, xi. 1

6. By a local Act, certain commissioners were authorised to levy rates for paving, lighting, watching, widening, and improving streets in a town:—*Held*, that, as the object was beneficial, not only to the inhabitants subjected to the rate, but also to all other persons having occasion to visit or pass through the town, the purpose was public and charitable within the meaning of the Statute of Charitable Uses. *Attorney-General v. Eastlake*, xi. 206

7. The question whether funds are dedicated to a charitable use within the statute 43 Eliz. c. 4, depends, not on the source from which the funds are derived, but on the purpose to which they are to be applied. *Ib.*

CHARITY.

See APPENDIX, vol. ix, p. x; vol. x, pp. iii, v, xxxvii—APPOINTMENT—APPORTIONMENT—CONSTRUCTION—LEGACY—MORTMAIN—MORTMAIN ACT—STATUTES, CONSTRUCTION OF, 9 Geo. 2, c. 36; 1 Will. 4, c. 60, s. 23—TRUSTEE AND CESTUI QUE TRUST.

1. The Court ought not to decree the sale of a charity estate, except upon a very special case; and so much of an information as sought to obtain an inquiry preparatory to that decree, in the absence of any special case for it, was dismissed. *Attorney-General v. The Mayor, Aldermen, and Burgesses of Newark-upon-Trent*, i. 395

2. If a scheme for the regulation of a charity, settled by a decree, does not operate beneficially for the charity, and the Attorney-General considers that the in-

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terests of the charity would, consistently with the foundation, usage, and law, be promoted by an alteration of the scheme, it is competent to him to apply to the Court for such alteration; but schemes which have been settled under the directions of the Court ought not to be disturbed upon merely speculative views, or in matters of discretion or regulation, upon which Judges or Attorneys-General may differ in opinion, or except upon substantial grounds, and clear evidence, not only that the scheme does not operate beneficially, but that it can, by the alteration, be made to do so consistently with the object of the foundation. *Attorney-General v. The Bishop of Worcester*, ix. 328

3. A scheme, settled by decree, which might be altered upon information, may be altered upon petition under Sir S. Romilly's Act (52 Geo. 3, c. 101), if otherwise a proper subject for such a petition. *Ib.*

4. Although it has been held that a decree of the Court of Chancery confirming the decree of the Commissioners of Charitable Uses is not examinable—the same being in the nature of a bill of review—and there cannot be a bill of review upon a bill of review; such an objection does not apply to a proceeding brought to alter the regulations of a charity settled by the decree of the commissioners and confirmed in Chancery, in a case where no bill of review is necessary. *Ib.*

5. The jurisdiction of the Court as to charities under Sir S. Romilly's Act, in cases arising between the trustees and the objects of the trust, may be exercised according to the discretion of the Court, where it can be applied with justice to the parties and benefit to the charity. And, *semble*, the Act may safely be resorted to in cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney-General properly represents them all, and in cases where, though there may be distinct interests, no substantial question of principle can arise between the several objects of the charity. *Ib.*

6. The Attorney-General acts on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity, who are thus, in effect, plaintiffs through him. *Attorney-General v. The Bishop of Worcester*, ix. 361

7. After a distribution of charity funds for more than two centuries among the poor of certain parishes, an adverse claim on behalf of other parishes to participate in the benefit of the charity is not properly brought forward by petition under Sir Samuel Romilly's Act, but is properly the subject of an information. *In re*

CHARITY.

Magdalen Land Charity, Hastings, and of the 52 Geo. 3, c. 101, ix. 624

8. Sums invested by the testatrix in stock, and other sums placed by her in the savings bank, were the produce of monies which had been partly collected and partly appropriated by the testatrix for the purpose of building and endowing a church in a certain parish. The stock had been invested in the names of the testatrix and of another person. At the time of the decease of the testatrix no deed appointing or declaring the trusts of the money had been executed, and no site for the intended church had been obtained:—*Held*, that the money and stock were, at the death of the testatrix, part of her personal estate; and that the liability either of the money or the stock to any charitable use was excluded by the stat. 9 Geo. 2, c. 36. *Girdlestone v. Creed*, x. 480

9. Exception to stat. 9 Geo. 2, c. 36, in the case of a bequest of monies to the extent of £500 for building or endowing a church. *Ib.*

10. Declaration of the trusts of the meeting houses for religious worship by the people called Methodists, and of the power of appointing preachers in such houses under the trusts thereof, in conformity with the rules and regulations of the society. *Attorney-General v. Clapham*, 540

11. Where it appeared that the paramount object of a charitable foundation for the purposes of religious worship in a particular locality was, that it should form a branch of a certain association; and that association, subsequently, in the course of its legitimate development, became subjected to an especial form of government and discipline; and deeds had been executed by the trustees of the charity estate, soon after the time of the endowment, declaring trusts of the property, which were defective in their provisions, and also gave or reserved powers to the local trustees inconsistent with the general government and discipline of the associated body, the Court, in a suit brought a century after the date of the declaration of trust, rectified the deed, so that the estate might be held and administered in conformity with the paramount intention that the local foundation should remain connected with and form a part of the general body. *Ib.*

12. Incompetency of parties to make, for the first time, an effectual declaration of charitable trusts, many years after the foundation of the charity. *S. C.*, x. 611

13. The proper form of suit to administer the funds of a charity is the information of the Attorney-General; but the trustees

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may file a bill against the Attorney-General to have the accounts of the charity taken, and to be personally discharged from liability in respect thereof, submitting to such account as the Attorney-General would be entitled to ask against them in an information; and in the same suit, if the Attorney-General desires it, the Court will direct a reference for a scheme. *The Governors of Christ's Hospital v. Attorney-General*, v. 257

CHARTERPARTY.

See PLEADING—SHIP.

An agreement between the owners and the merchants for the employment of a ship on a certain voyage, not in writing, but acted upon by the parties, is equivalent to a charterparty. *Lidgett v. Williams*, iv. 462

CHEQUES.

See EVIDENCE.

CHILDREN.

See ADEPTION—ALIEN—CONSTRUCTION—CY PRES—FAMILY—JOINT TENANCY—SETTLEMENT—STATUTES, CONSTRUCTION OF, 7 Will. 4 & 1 Vict. c. 26; *Id.* ss. 3, 24, 33.

1. Construction of the word "children" as under the special words of a will describing both legitimate and illegitimate children. *Evans v. Davies*, vii. 498

2. A testator bequeathed legacies to his children, M., S., J., W., and N., appointing his wife their guardian, and directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, and the residue of the proceeds of certain real estates, should be divided between all his children of his first and second marriages. The testator then charged other parts of his real estates with certain annual payments, and directed that the remainder of the rents and profits should be divided among all his said children. The testator then directed, that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares and legacies should go between his second wife and such of his children by her as should be living, and he gave the residue of his estate to all and every of his children:—*Held*, that the said S., who was a child by the second wife before marriage, was within the description of "children" contained in the will, and entitled to share

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with the legitimate children of the testator in the residuary gifts. *Ib.*

3. A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attained the age of twenty-one, and to accumulate the surplus; and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them £2,000; and as soon as all and every the said grandchildren should have attained their ages of twenty-one, to pay and divide the trust-fund unto and amongst all and every his said grandchildren:—*Held*, to be a gift for the benefit of all the children of the testator's two sons, born or to be born—not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born. *Mainwaring v. Beevor*, viii. 44

CHOSE IN ACTION.

See VOLUNTARY ASSIGNMENT.

CHURCH.

See CHARITY.

CHURCH OF SCOTLAND.

See TRUSTEE AND CESTUI QUE TRUST.

CHURCHWARDEN.

On an application for the confirmation of a report approving a scheme for the administration of a charity estate, of which the churchwardens and overseers of the parish were the trustees (one of the purposes of which scheme was to provide for the repair of the church), it was *held* that a churchwarden, who had been newly appointed, and had not been served with the proceedings, was at liberty to present a cross-petition, for the purpose of opposing the confirmation of the report, upon grounds not appearing upon the report nor brought before the Master. *In re Loppington Parish*, viii. 198

CITY OF LONDON.

See TITHES.

CLAIM.

CIRCUITY.

See AGREEMENT.

CLAIM.

See APPENDIX, vol. ix, pp. x, lxvii; vol. x, p. xl.

1. The plaintiff in a claim, as in other forms of proceeding, can only recover *secundum allegata et probata*. *Johns v. Mason*, ix. 29

2. The Court will not, under the 13th Order of April, 1850, upon the hearing of a claim, direct further inquiries to be made, or other proceedings to be had, for the purpose of ascertaining the plaintiff's title to the relief claimed, where such inquiry would, in effect, be recommencing the case, or originating another case. *Ib.*

3. The Court, upon the hearing of a claim, made an order for taking accounts and executing a trust; and *held*, that the pendency of a suit by bill in which the same accounts and directions would be necessary, and which sought additional relief in respect of alleged breaches of trust, was not a ground for staying the order, upon the claim. *Scott v. Lord Hastings*, ix. 35

4. The Orders of the 22nd of April, 1850, relating to claims, were intended to apply to cases where the decree would have been of course in a suit by bill bringing all proper parties before the Court. *Eccles v. Cheyne*, ix. 215

5. The provisions in the General Orders of the 22nd of April, 1850, as to parties, are designed to save the expense of bringing before the Court, at the hearing, in the cases to which claims were intended to apply, persons whose interests are concurrent with those of the plaintiff; and to restore the rule existing in Lord Hardwicke's time, which allowed such parties to be brought in before the Master. *Ib.*

6. The Court will not give relief on a claim where the material facts of the case, being in the plaintiff's knowledge, are not stated upon the claim, and the case stated upon the claim is not the case upon which the Court is to adjudicate. *Goode v. West*, ix. 378

7. It is in the discretion of the Court, at the hearing of a claim, to grant or refuse the relief thereby sought, notwithstanding the case may fall within one of the classes referred to in the General Order I. of the 22nd of April, 1850. *Penny v. Penny*, ix. 39

8. Where, by the decree upon the claim of a legatee, it would be necessary to take the accounts of a trade carried on by persons who were not parties to the claim—of the assets by which it was alleged that the

CLAIM.

trade had been carried on,—and of the allowances which should be made in remuneration of the persons employed in it who were not parties to the claim, and the claim contained no statement of the facts upon which such accounts and inquiries might depend,—the Court refused to direct inquiries into the facts necessary to be shown in order to sustain the claim, but dismissed the claim without costs and without prejudice to a bill. *Ib.*

CLASS.

See LEGACY—NEXT OF KIN.

CIAUSTRAL SCHOOL.

See JURISDICTION.

CLERICAL ERROR.

See APPENDIX, vol. x, p. vi.

CO-DEFENDANT.

See EVIDENCE.

The Court will try a case between co-defendants, and the co-defendants will be bound by the result of such trial, where the plaintiff is entitled to relief, and cannot obtain relief unless that be done; but if the relief to be given to the plaintiff does not require or involve the decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be only necessary to the decree the plaintiff obtains. *Cottingham v. Earl of Shrewsbury*, iii. 627

COLLIERY.

See INSPECTION.

COLLUSION.

See ADMINISTRATION SUIT—INSOLVENT DEBTOR.

COLONIAL COURT.

See JURISDICTION.

COLONIAL LAW.

The Courts of this country will apply the general law of this country (being abstractedly just, and not exclusively founded upon any peculiar or technical rule) to questions relating to lands in a colony, where a different system of jurisprudence prevails, unless it is suggested or shown

COMMON LANDS.

that the laws of the colony are different on the point in question; and therefore the mortgagee of an estate in Demerara was held not to be bound to produce his securities for inspection before payment. *Bentinck v. Willink*, ii. 1

COMMERCIAL PROPERTY.

See TRUSTEE AND CESTUI QUE TRUST.

COMMISSION.

See ANSWER—COSTS.

1. Where the defendant obtains a commission to examine witnesses under the 17th (amended) Order of April, 1828, the commission must be made returnable the first return of the 2nd term next following the date of the order for such commission.

M'Gregor v. Topham, ii. 516

2. If in the prosecution of inquiries under a reference to the Master, a commission to examine witnesses abroad be necessary, an application must be made to the Master for his certificate, before applying to the Court for the commission. *Bamford v. Bamford*, ii. 642

3. *Semble*, the motion for the commission, on the Master's certificate, is of course. *Ib.*

COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT.

See PLEADING.

COMMITTAL.

See RECEIVER.

COMMON LANDS.

In 1784 a certain tenement and four acres and one acre and a half of land dispersed in the common field of A., were conveyed to the party under whom the vendor claimed. In 1818 the devisee of the same party conveyed the tenement with an allotment of land described as containing three acres and one rood allotted to the devisor, under an Act passed in 1801 for enclosing part of the parish of A., in lieu of five acres of common field lands. The estate was contracted to be sold in 1841:—*Held*, that, in the absence of any proof that the whole of the common lands in A. had not been allotted, or that any other allotment had been made to the same party, the Court would assume that the allotment had been made in substitution of the common lands comprised in the deed of 1784. *Major v. Ward*, 698

COMMON SEAL.

COMMON SEAL.

See JURISDICTION.

COMPENSATION.

See LESSOR AND LESSEE—MORTGAGOR
AND MORTGAGEE—SPECIFIC PERFORM-
ANCE—VENDOR AND PURCHASER.

COMPETENCY.

See EVIDENCE.

COMPROMISE.

See SPECIFIC PERFORMANCE.

COMPROMISE OF SUIT.

See SOLICITOR AND CLIENT.

COMPUTATION OF TIME.

See SUNDAY.

CONDITION.

1. The testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support, until she attained twenty-one, or married with the consent of his trustees under that age, and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards declared by a codicil, that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry; and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder:—*Held*, that the limitation over by the codicil, being in general restraint of marriage, was void as to the life-interest of the daughter. *Morley v. Renoldson*, ii. 570

2. Whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil—*quære*. *Ib.*

CONDITIONS OF SALE.

See SPECIFIC PERFORMANCE.

1. The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived:—*Held*, that the time for objecting was not

CONDUCT OF CAUSE.

to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed. *Blacklow v. Lums*, ii. 40

2. A condition of sale was, that, in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser; and objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries; the purchaser on the same day objected to the answers: the correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract:—*Held*, that the continuance of the treaty for the completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding of the contract. *Morley v. Cook*, ii. 106

3. That such a condition of sale ought to be discouraged, and ought not to receive a construction oppressive on the purchaser. *Ib.*

4. That the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition. *Ib.*

5. That the vendor was only bound *bonâ fide* to deliver an abstract of such title as he had at the time of delivering it; and, so long as the condition remained in force, was not bound to deliver any supplemental abstract of title afterwards acquired—*semble*. *Ib.*

6. Whether the benefit of the condition would not in equity be forfeited by a vendor who designedly delivered an imperfect abstract of the title which he had at the time of delivering it—*quære*. *Ib.*

CONDITIONAL APPEARANCE.

See APPEARANCE.

CONDUCT OF CAUSE.

See APPENDIX, vol. x, p. xli.

1. Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the Master is not bound to give the conduct of the sale to the plaintiff, but may, in his discretion, if

CONDUCT OF CAUSE.

he considers it more beneficial to the estate, give the conduct of the sale to other parties. *Dixon v. Pyner*, vii. 331

2. Grounds on which the conduct of a sale, under the decree of the Court, may properly be given to parties other than the plaintiff. *Ib.*

CONFIRMATION OF REPORT.

See PURCHASER.

The plaintiff obtaining the order nisi to confirm the Master's report, but not proceeding to make the order absolute, the defendant may move to confirm the report, and for that purpose the certificate of no cause shown will be ordered to be entered on his office copy of the order nisi. *Roberts v. Williams*, ii. 151

CONGREGATION.

See TRUSTEE AND CESTUI QUE TRUST.

CONNIVANCE.

See TRUSTEE AND CESTUI QUE TRUST.

CONSENT.

See ARTICLES BEFORE MARRIAGE.

CONSIDERATION.

See ANNUITY—BILL OF EXCHANGE—FRAUD—VALUABLE CONSIDERATION.

1. The Court may not perhaps enforce the specific performance of a contract for the sale of an estate, where the consideration is uncertain (as a life annuity), if such consideration be greatly inadequate; but a difference of seven or eight per cent. is not such inadequacy. *Bower v. Cooper*, ii. 408

2. The testator sealed and delivered a bond, conditioned for the payment of an annuity, after his death, to a woman with whom he had cohabited. At the time he gave instructions to prepare the bond, he stated, that it was not his intention to break off his connection with the obligee; and he deposited the bond with his solicitors, with whom it remained until after the death of the obligor. On a reference to the Master, he found, that the consideration of the bond was past cohabitation:—*Held*, that the bond was valid; that, being proved to have been sealed and delivered, the retention of it in the hands of the obligor's solicitor did not affect its operation; and that, after the facts had been referred to the Master, and the Court was satisfied with his finding, payment of the

CONSIGNEE.

sum secured by the bond would be decreed, without a trial at law. *Hall v. Palmer*, iii. 532

3. The cases in which collaterals are not within the consideration of a marriage settlement, proceed upon the ground, that the wife cannot be considered to stipulate on the part of the relations of the husband; but limitations in favour of collaterals are supported, if there be any party to the settlement who purchases on their behalf. *Heap v. Tonge*, ix. 104

4. The non-payment and probable loss of a cheque on his bankers, which A. had signed and delivered to B., is not a consideration to support a promise by A. to give a new cheque for the same amount to C., to whom it was alleged that B. had sent the lost cheque. *Johns v. Mason*, ix. 29

5. The release and assignment by a married woman of her life interest in her separate estate, although fettered by a restriction against anticipation, was held to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income: and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made. *Harman v. Richards*, x. 81

6. Parties to a series of deeds considered as stipulating according to the rights which they had. *S. C.*, x. 88

7. Consideration for a settlement being found to exist, it was held to extend to the whole and not to a part only of the property which was the subject of it. *Ib.*

8. A deed, though made for valuable consideration, may be affected by mala fides. *S. C.*, x. 89

9. The statement in a deed of settlement, executed after marriage, was, that it was made in consideration of 5s., and divers other good and valuable considerations:—*Held*, that this statement did not, as against strangers to the settlement, amount to evidence that it was not voluntary; and a defendant claiming against it as a purchaser for valuable consideration, and insisting at the bar that the settlement was fraudulent and void under the stat. 27 Eliz. c. 4, the Court directed an inquiry whether the settlement was founded on any and what valuable consideration. *Kelson v. Kelson*, x. 385

CONSIGNEE.

Mode of taking accounts, as against mortgagees and consignees, of the produce
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CONSTRUCTION.

of a West India estate. *Faulkner v. Daniel*, iii. 218

CONSIGNMENT.

See ANNUITY.

CONSOLIDATION OF SUITS.

See APPENDIX, vol. x, p. xli.

CONSTRUCTION.

See ACCOUNT—ACCUMULATION—AGREEMENT—ALIENATION—ANNUITY—CHARITABLE BEQUEST—CHARITABLE TRUST OR USE—CHILDREN—CONDITIONS OF SALE—CONVERSION—COPYHOLD—CREDITORS—CY PRES—DEVISE—ELECTION—EVIDENCE—FAMILY—HEIRLOOMS—HUSBAND AND WIFE—INTEREST OF LEGACY—INVESTMENT—JOINT STOCK COMPANY—LEGACY—LEGAL ESTATE—MINES—NEXT OF KIN—PARTNERSHIP—PLEA—PORTION—POWER—PRINCIPAL AND SURETY—RELEASE—RE MOTENESS—RESIDUARY SHARE—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF—TENANT FOR LIFE AND REMAINDERMAN—TRUSTEE AND CESTUI QUE TRUST—WILL.

1. A married woman, having several legitimate children, and one illegitimate child, and being separated from her husband, and enciente with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety, in favour of any after-born children she might have born of her body. After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund equally between the two illegitimate children:—*Held*, that the after-born children, for whose benefit the revocation might be made, must be taken, in the primary and legal sense, as applying to legitimate children only—that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment. *Dover v. Alexander*, ii. 275

2. An agreement to sell land, not expressing what interest in it, is construed to mean the whole of the interest of the vendor in the land. *Bower v. Cooper*, ii. 408

3. An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity. *Id.*

4. The testator bequeathed his residuary

estate upon trust for his son for life, and after his decease for the children of his said son; and he directed, that, in case his said son should at any time thereafter come into the actual possession of an estate entailed upon him (the testator) and his issue by his late uncle R. D., of B., then, and in such case, the provision which he had thereinbefore made for his said son, and all and every the trusts thereof, should cease, determine, and be void, and the trustees should thenceforth stand possessed of the said trust-monies for the benefit of his other children, exclusive of his said son. R. D., of B., the late uncle of the testator, had settled three estates to uses, which included, after several estates for life and in tail, a limitation in remainder to his nephew (the testator) for his life, with remainder to trustees upon trust to preserve contingent remainders, with remainder to the first and other son and sons of the body of his said nephew severally and successively in tail male, with divers remainders over. Before the date of the will, a tenant in tail, who had the then first expectant estate tail, joined with the first tenant for life in a recovery, whereby such tenant in tail had acquired the fee as to one of the three estates; but whether that fact was known to the testator did not appear. After the death of the testator, the same tenant in tail came into possession of the property, and suffered recoveries, whereby the entail as to the two remaining estates was barred; and he then devised the three estates to the son of the testator in fee, subject to certain charges, under which devise the said son afterwards entered into possession of the same three estates:—*Held*, that the possession thus acquired was not an actual possession of the estate entailed upon the testator and his issue within the meaning of the will. *Taylor v. Harewood (Earl)*, iii. 372

5. The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under twenty-one without issue, the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that, from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then living of his sister Mary Miles, and the issue then living of such of them as should be then

CONSTRUCTION.

dead, equally amongst them per stirpes. The testator's son died under twenty-one, without issue, in the testator's lifetime; and the testator's wife also died in his lifetime:—*Held*, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, per stirpes, to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles—such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator—were also entitled per stirpes to an equal share of the said moiety of such residuary estate; and that the share of the child of a daughter would not lapse by the death of such child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell v. Holmes*, iii. 438

6. The testator appointed A., B., and C. executors and trustees of his will, providing, that, if either of them, or any succeeding trustee or trustees, should die, or refuse or neglect or become incapable to act in the trust, it should be lawful to and for the survivor of them, the said A., B., and C., and such new trustee or trustees, to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of the said A., B., and C., or either of them, or any future trustee or trustees so dying, or desiring to be discharged, or refusing or neglecting or becoming incapable to act as aforesaid. A. having disclaimed the trust, and B. having died, C. alone (though not the survivor of A., B., and C.) appointed new trustees under the power:—*Held*, that the new trustees were well appointed. *Cafe v. Bent*, v. 24

7. Bequest of £100 each to the two children of the testator's nephews, A. and B.; A. had three children, and B. two children:—*Held*, that the five children, who were living at the date of the will and at the death of the testator, were entitled, under the bequest, to £100 a piece. *Morrison v. Martin*, v. 507

8. Legacy to Anne, the wife of Peter, for life, remainder to Peter, the husband, for his life, and, after the death of the husband and wife, upon trust to pay the interest for the maintenance of such children of Anne as should be living at her death, until they should respectively attain twenty-one; and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and

transfer the legacy equally unto and amongst all the children of Anne, when and as they should severally and respectively attain their said ages of twenty-one years; and, if any of the said children should die under twenty-one, then unto such as should attain that age, share and share alike; and, in case all and every of the said children should die under age, then to pay the legacy to the testator's next of kin. The children of Anne, who attained twenty-one years of age, acquired vested interests in the legacy, notwithstanding such children died in the lifetime of Anne, the tenant for life. *Bradley v. Barlow*, v. 589

9. Bequest of sums of Consols and 4l. per Cent. Annuities to the testator's wife for her life, and at her decease one-half of the produce of such sums to be received and divided amongst the testator's surviving brothers and sisters, and their issue, share and share alike:—*Held*, that the brothers and sisters living at the death of the testator took vested interests in the fund, liable to be divested by their death leaving issue before the period of distribution; and that such issue took by substitution for their parents. *Shailer v. Groves*, vi. 162.

10. Devise and bequest of residuary real and personal estate to the testator's son and the heirs of his body for ever, and, in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike. The son takes an estate tail in the freehold part of the property. *Abram v. Ward*, vi. 165.

11. Real estate was devised in 1778 to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainders between them; and in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns for ever:—*Held*, that this was a good appointment of the estate under the power. *Eno v. Eno*, vi. 171

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12. That the words "and there being a failure of issue of" &c. must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power and her husband. *Ib.*

13. That the construction, that the donee might have intended to appoint, or to reserve a power to appoint, to the female descendants of sons, or to give such descendants the chance of taking by descent, would be merely conjectural; and, moreover, was excluded by the express language of the will creating the power, which made no provision for female descendants of male issue, and rebutted by the great age of the donee, who was then without any issue. *Ib.*

14. That the title of the plaintiff under the appointment was one which the Court, in a suit for specific performance, would compel the purchaser to take. *Ib.*

15. A gift to children in tail not comprehending all the issue, followed by a limitation over in terms "on failure of issue," will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than those provided for were intended to take. *Ib.*

16. If the question had arisen entirely under the will of the daughter, and the words "there being a failure of issue of" &c. had been found in that will, following limitations to her issue like those contained in the will of 1778, in this case, those words would have been construed to refer to a failure not of issue generally, but of such issue as the will had previously provided for. *Ib.*

17. For the purpose of determining the meaning of such a limitation, the principle of construction must be the same, whether the instrument be a deed or a will. *Eno v. Eno*, vi. 171

18. On construing an appointment of stock in these words, "unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares and proportions," it was *held*, that the qualification of living at the death of the wife attached only to the nephews and nieces, the last antecedent. *Baker v. Baker*, vi. 269

19. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. *Ib.*

20. The legatees took per capita. *Ib.*

21. Household furniture does not pass under the description of "fixtures and fittings-up." *Simmons v. Simmons*, vi. 352

22. Bequest for the benefit of unbene-
ficed curates, whose annual incomes do not

exceed £35, and to such as shall be recommended in a certain manner—*Held* to comprise two classes,—those having incomes of £35 and under, and also those recommended in the way prescribed. *Pennington v. Buckley*, vi. 453

23. A testator entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate, or of whatsoever kind, to his wife, for her life; and, at her decease, he gave all the property then left by him, and of which she was to have the income for her life, to his children; and on his wife's death, or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same in the maintenance of his children until the youngest should attain twenty-one:—*Held*, that the interest of the testator in remainder in the copyhold estate passed by his will. *Ford v. Ford*, vi. 486

24. The tendency of modern decisions is to read the different clauses of the same will referentially to each other, unless they are clearly independent. *S. C.*, vi. 492

25. Construction of a power of sale and exchange, in a settlement. *Marshall v. Madden*, vii. 428

26. The Court cannot impute to the Legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. *Beaden v. King*, ix. 522

27. Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease:—*Held*, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the Company made under the authority of an Act of Parliament, converted into consolidated stock; but *held* not to pass consolidated stock in the same Company purchased by the testator after the date of his will. *Oakes v. Oakes*, ix. 666

28. Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains. Shares under a settlement being *held* not to be vested, might create a resulting trust for the settlor; whilst in a will the residuary legatee might take. *Farrar v. Barker*, ix. 744

29. Fallacy of applying to a case of intestacy words which the testator has ap-

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plied to the case of testacy. *Robinson v. Governors of the London Hospital*, x. 28

30. An agreement by a creditor not to take proceedings against the debtor during his life, nor against the debtor's estate during the life of his wife, if she should survive him, construed (as to the latter clause) to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and, therefore, the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Harman v. Richards*, x. 81

31. Construction of a will as supposing the testator to contemplate the period of his death with reference to the objects who are to take under his will, and to look beyond that period with reference to the event on which his dispositions are to take effect. *In re Rye's Settlement*, x. 112

32. By a will property was given to trustees to apply the rents, interest, and proceeds for the maintenance of the testator's son Edward for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil, it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil, the testator gave £600 stock to Edward, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—*Held*, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That, although in one codicil the words "in the event of the death of Edward" meant upon the death of Edward, it did not follow that the words in another codicil, "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life

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interest, and the other to a capital sum. That the period of survivorship must be referred to the period of distribution—namely, the death of the testator: That, therefore, Edward, having survived the testator, took the legacy of stock absolutely. *In re Mores' Trust*, x. 171

33. The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given—*quære*. *Ib.*

CONSTRUCTIVE NOTICE.

See NOTICE.

CONSTRUCTIVE TRUST.

See ACQUIESCENCE—*LIS PENDENS*—TRUST.

CONTEMPT.

See APPENDIX, vol. x, p. xli—RECEIVER.

1. Jurisdiction of the Court to grant or dissolve an injunction, or commit for contempt in cases where the plaintiffs or defendants, or other persons, publish notices or advertisements with reference to the subject of a suit calculated to prejudice the rights or misrepresent the relative position or character of any of the parties to the cause. *Matthews v. Smith*, 331

2. A prisoner in contempt, and remanded until he should answer the bill, and clear his contempt, or the Court should otherwise order, filed a plea, and obtained an order, upon petition, *ex parte*, at the Rolls, upon certificate of plea filed, to tax the costs of the contempt, and for his discharge upon payment or tender of such costs; he did not pay or tender such costs, and the Court, on motion by the plaintiff, ordered the plea to be taken off the file. *Wilkin v. Nainby*, iv. 473

3. A defendant in contempt cannot, in answer to an application founded on the contempt, object that the plaintiff has not taken a step in the cause, which might have amounted to a waiver of the contempt. *Ib.*

4. Sole defendant in contempt ordered to be discharged from prison on his own motion, the sole plaintiff being dead. *Terrill v. Souch*, iv. 535

5. A party in contempt for non-payment of costs, and being served with an order nisi to confirm a report, may, notwith-

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standing his contempt, take exceptions to the report, and draw up, pass, and enter an order to set down the exceptions; and may also present, and be heard upon, his petition to discharge the report as irregular, and for liberty to open the accounts allowed in former reports, on the ground that items therein were allowed in the absence of the petitioner, and while the suit was abated. *Morrison v. Morrison*, iv. 590

CONTINGENT GIFT.

See NEXT OF KIN.

CONTINGENT OR VESTED INTEREST.

See PAYMENT INTO COURT.

A gift of residuary estate to A., and such of the children of B. as should be living at the death of C., their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivor or survivors, and other or others of them the said children of B. and the said A. living at the decease of C., and his and their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of B. attaining twenty-one and surviving C. and the said A., in case A. survive C., should take equally per capita:—*Held*, that A., surviving the testator and dying in the lifetime of C., took, nevertheless, with the children of B. who survived C., a vested share in the residuary estate. *Falkner v. Grace*, ix. 282

CONTINGENT LEGACY.

See LEGACY.

CONTINGENT REMAINDER.

See DEVISE.

1. Contingent remainder created by a limitation to the use of the husband and wife, and the survivor and the heirs and assigns of the survivor, barred by a fine subsequently levied by the husband and wife. *Parker v. Carter*, iv. 409

2. A devise of real estate to the use of A. for life, with remainder to the use of all and every the child or children of A. who shall attain the age of twenty-one years, and for want of such issue, over,—creates a tenancy for life in A., with a contingent remainder in fee to such of the children of A. as shall attain twenty-one; and on the death of A., leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of A. was divested, and the

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limitations over were defeated. *Festing v. Allen*, v. 573

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See ACCOUNT—AGREEMENT—ARTICLES BEFORE MARRIAGE—ASSIGNMENT—BROKER—CHAMPERTY—COPYRIGHT—COVENANT—DEBTOR AND CREDITOR—JOINT STOCK COMPANY—JURISDICTION—LESSOR'S TITLE—MINES—MISREPRESENTATION—PARTNERSHIP—POWER—SHIP REGISTRY ACTS—SPECIFIC PERFORMANCE—TENANT FOR LIFE AND REMAINDERMAN—TITLE—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. Suggestions made by a vendor or purchaser as to the course which might be adopted for the purpose of obviating difficulties in the completion of a contract, are not to be taken as an abandonment of the original contract, and the substitution of a new one. *Monro v. Taylor*, viii. 61

2. If time is to be considered as of the essence of a contract, that point must be made promptly. *S. C.* viii. 62

3. Disputes having arisen between a Railway Company and a contractor employed in making the railway,—the Company, insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works themselves; and the contractor resisting such claim, imputing the backward state of the works to the acts of the Company, and holding forcible possession;—collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other; and the completion and opening of the railway for traffic being in the meantime delayed,—the Court, on the application of the Company, restrained the contractor from continuing on the line or interfering with the operations of the Company; directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the Company's engineer; and an issue to try whether the Company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *The East Lancashire Railway Company v. Hattersley*, viii. 72

4. The rule under which the Court permits a stranger to intervene for the purpose of opening biddings on a sale by auction before the Master, has no application to a

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sale before him by private contract. *Millican v. Vanderplank*, xi. 136

5. When the Master has, in the presence of the parties, approved of a sale by private contract, whether under a special reference, or under the 4th General Order of the 16th of July, 1851, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the Court on the mere ground that a larger price has been offered subsequently and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate. *Ib.*

6. When there are grounds upon which the Court would refuse to confirm a sale by private contract approved by the Master, the fact that the purchaser has, after the approval of his contract, and before the confirmation of the report, entered upon the property, and expended money thereon, or incurred liabilities with respect to it, will not afford any reason for supporting the sale; for such acts, before the confirmation of the report, are done at the purchaser's own risk, or in his own wrong; but where all the parties interested in the estate have approved of or acquiesced in the contract, and concurred in and encouraged such acts of the purchaser, they may then constitute reasons for not disturbing the sale. *Ib.*

CONTRACT FOR SALE.

See MORTGAGOR AND MORTGAGEE.

CONTRIBUTION.

See DEBTOR AND CREDITOR.

Bill by a trustee under an Act of Parliament for making and maintaining roads, who had acted in the trust, against some of his co-trustees, for contribution towards a debt recovered from the plaintiff by bankers who had advanced money, under the orders of the trustees for the purposes of the trust—directed, at the hearing, to stand over, giving the plaintiff liberty to add such other trustees as parties to the suit, as the several defendants by their answers submitted were necessary parties, and liable to contribute, if they (the defendants) were liable—the plaintiff electing not to waive his right against such other parties. *Wilson v. Goodman*, iv. 54

CONVERSION.

See DEBTOR AND CREDITOR — POWER — TENANT FOR LIFE AND REMAINDERMAN.

1. Real estate was conveyed to a trustee,
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on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs) to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail:—*Held*, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. *Bourne v. Bourne*, ii. 35

2. Residuary gift of the whole income of the testator's property (which included leasehold and long annuities) to his wife for her life, at her own disposal, but not to sell without the consent of all parties, remainder to the brothers of the testator equally:—*Held*, that, construing the gift with reference to the other provisions of the will, the widow was entitled to the income of the property for her life, in the state of investment in which it was left by the testator. *Hinves v. Hinves*, iii. 609

3. *Semble*, in the application of the rule for converting into permanent investments, at the death of the testator, perishable property in which he has given interests for life, and other interests in succession, the inclination of the Court in the later cases, when the meaning was doubtful, has been in favour of that construction which would give to the tenant for life the enjoyment of the property in specie. *Ib.*

4. After a specific gift of certain leasehold houses to the testator's wife for her life, she paying the ground-rents and performing the covenants, with remainder over to his nephew, the testator bequeathed the "rents and profits, dividends and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons:—*Held*, that the widow was not entitled to the enjoyment in specie during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. *Pickup v. Atkinson*, iv. 624

5. A direction to sell particular parts of the testator's personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed

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existence of a definite intention that the property shall be converted, but upon the expressed intention that the legatees shall enjoy the property in succession. *Cafe v. Bent*, v. 34

6. The direction, that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that the testator contemplated the enjoyment of the leasehold property *in specie* by the legatees. *S. C.*, 36

7. Conveyance of the equity of redemption of real estate to trustees, for sale, for the benefit of the creditors of the author of the deed, and upon trust, if there should be any surplus, to pay the same to him, his executors, administrators, and assigns, to and for his and their own absolute use and benefit:—*Held*, to be a conversion of the real estate into personalty, as between the real and personal representatives of the author. *Griffith v. Ricketts; Griffith v. Lunell*, vii. 299

8. *Held* also, that the ultimate surplus of the proceeds of the real estate being reserved to the author of the deed, and the deed not being revoked, and no attempt having been made to revoke it, it was not material, as between the real and personal representatives of the author, whether the deed was or was not revocable. *Ib.*

9. That the question whether the surplus proceeds of the trust property belonged to the real or personal representative, was not affected by the state, whether of realty or personalty,—in which such surplus was found, although the state of the property might affect the character in which such surplus would go to the one or the other of such representatives. *Ib.*

10. If the author of a deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate, from the delivery of the deed, and is equivalent to a gift of the expectancy of his heir-at-law to his personal estate. *Ib.*

11. The principle is the same in the case of a deed as in the case of a will; but in the former case the conversion takes place in the lifetime of the party making it,—in the latter, not until his death,—and the rights of the real and personal representatives in each case are governed by the simple effect of the instrument. *Ib.*

12. The onus of proving the reconversion is on the plaintiff, who claims under the heir-at-law of the author of the deed. *Ib.*

13. Where a testator by his will gave his estate, including copyhold of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and

grandchildren, in twenty aliquot shares, and directed some of such shares to be invested in the government funds for the infant legatees, and requested his executors on his death to get his property together and divide it, it was *held*, that the will must be taken to direct a sale and conversion of the copyhold estate. *Mower v. Orr*, vii. 475

14. The testator gave his real and personal estate to trustees upon trust to apply the rents, issues, and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed out upon Government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and upon their death, the said monies and effects to be divided amongst their children:—*Held*, that there was no conversion, by the will, of the moiety of the real estate devised to the daughters on the youngest attaining twenty-one. *Cornick v. Pearce*, vii. 477

15. By a marriage settlement freehold estate and some personal estate were conveyed and assigned to trustees, upon trust, on the request of the husband and wife, during their joint lives; and, after the death of either, upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase-money, in case the same should be sold, upon trust for the husband for his life; and, after his decease, upon trust for the wife for her life; and after the death of the survivor of them to convey the estate, unless sold, and assign the personal estate, unto the children and grandchildren of the marriage, born in the lifetime of the husband and wife, as they or the survivor should appoint; and, in default of appointment, unto and amongst the children of the marriage, equally. The estate was taken by the Corporation of London under the London Bridge Act (4 Geo. 4, c. 50), and the price having been fixed by a jury, the purchase-money was paid into Court under the Act,—the trustees of the settlement not making out a satisfactory title:—*Held*, that, in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only; and, therefore, that the purchase-money was impressed with the character of real estate under the 35th section of the London Bridge Act. *In re Taylor's Settlement*, ix. 596

16. That, if there had been any conversion, it must have been by the conjoint operation of the articles and settlement

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and of the Act of Parliament; but that the settlement and Act of Parliament could not in this case have any conjoint operation. *Ib.*

17. That the estate having been real when settled, it was not meant by the settlement that it should become personal, unless the husband and wife, or the survivor, requested it to be sold. *Ib.*

18. That the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require. *Ib.*

19. That the payment of money into Court, owing to an objection to the title, and the application of the trustees and tenants for life for the dividends, did not tend to connect the sale with the trust, but led to a contrary conclusion, inasmuch as the City of London, having the power to require a perfect title under their Act, would not be likely to prefer an imperfect one under the trust. *Ib.*

20. That there could be no sale pursuant to the trust without a conveyance of the estate by the trustees, and the payment of the purchase-money to them; and if, after the fixing of the price by a jury, there had been a conveyance by the trustees, at the request of the tenant for life, the Court would have held the sale to have been under the trust:—*Semble.* *Ib.*

21. Devise and bequest of freehold, copyhold, and leasehold estate, upon trust for sale, with a direction that the proceeds, after payment of all costs, charges, and expenses attending the same, shall be considered, to all intents and purposes, as part of the testator's personal estate; and a gift of the residue of his money, *London Assurance stock, securities for money, &c., to the London Hospital, for the purposes of the charity*:—*Held*, that the real and personal estate were thrown into one mass; and that the charge of debts, legacies, and costs were to be apportioned between the real and personal estate pro rata. *Robinson v. The Governors of the London Hospital,*

x. 19

22. A direction that the proceeds of the real and leasehold estate should be considered as part of the personal estate, does not take away the right of the heir; nor does the addition to that direction, that the real estate shall be taken to be personal estate "to all intents and purposes," take away that right. *Ib.*

23. After the testator, who was a shop-keeper, had made a will, bequeathing his leasehold house and shop and the stock in trade therein to his wife (subject to certain

COPY OF BILL.

trusts, which failed), and giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out; but his wife, not being disposed or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees, in an agreement for the sale of the leasehold premises and stock in trade therein for a gross sum, to be paid by instalments. After this agreement was made, and possession of the property delivered to the purchaser, the testator died. The Court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect:—*Held*, that, notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock in trade must be taken as unconverted at the death of the testator, and passed to the specific legatee. *Taylor v. Taylor,* x. 475

CONVERSION OF LOAN NOTES INTO SHARES.

See JOINT STOCK COMPANY,

COPIES.

See PIRACY.

CO-PLAINTIFFS.

See DISMISSAL.

If several co-plaintiffs allege by their bill that they are jointly, or in some joint character, entitled to the subject of the suit, and one or more of them would be so entitled, if, in this respect, the others or other of them were not (no issue being joined on the question of the title, if any, being joint), it is not necessary for the plaintiffs, as between themselves, to prove in the cause, as against the defendant, that their right, if any, is a joint right. *Blair v. Bromley,* 554

COPY OF BILL.

See APPEARANCE—PARTIES.

1. Verification of the copy of the bill to be served under the 24th Order of August, 1841. *Penfold v. Bouch,* ii. 157

2. Verification of the copy of the bill, served under the 24th Order of August, 1841. *Coleman v. Rackham,* ii. 354

3. It is not sufficient that the copy of the bill served under the 24th Order has been examined with the office copy, unless the office copy be proved to have

COPY OF BILL.

been examined with the engrossment. *S. C.*, 184

4. It is sufficient to state that the copy of the bill served under the 24th Order of August, 1841, is a true copy; and not necessary to show (as in *Penfold v. Bouch*) the manner of examination. *Broughton v. Broughton*, iii. 335

5. Order for leave to enter the service of a copy of the bill under the 24th Order of August, 1841, on the statement at the bar, that the draft, as settled by counsel, contained no prayer for account, payment, conveyance, or other direct relief against the defendant, without requiring an affidavit of that fact, or explanation of the nature of the suit. *Hudson v. Dungworth*, iii. 508

6. Bill by one child, entitled with the other children to the residue of real and personal estate, against the widow and eldest son of the testator, who were the trustees and executor, for the execution of the trusts of the will, and administration of the estate, and praying a receiver. The widow claimed a life estate adversely to the children:—*Held*, that the residuary legatees, who were defendants (other than the executor), were properly served with a copy of the bill, under the 23rd Order of August, 1841. *Davis v. Davis*, iv. 389

7. In a suit by some of the members of a class claiming to be entitled under a conditional limitation by devise in favour of such class, against parties who claimed under a recovery suffered of the estate by the first taker under the same devise, the other members of the class in the same interest as the plaintiffs, who decline to become co-plaintiffs, may be served with the copy of the bill, under the 29th Order of August, 1841; and if they are required to appear and answer, their costs must be paid by the plaintiff. *Abram v. Ward*, 170

COPYHOLD.

See ESCHEAT—INSOLVENT DEBTOR—MARSHALLING—RECEIVER—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 104.

1. The Court might enforce the specific performance of an agreement between joint-tenants of a copyhold estate to divide the land and hold the respective parts in severalty, and decree the parties to make mutual surrenders for that purpose; although, before the stat. 4 & 5 Will. 4, c. 35, the Court had not jurisdiction, in a mere suit for partition, to decree the partition of copyholds. *Bolton v. Ward*, iv. 530

2. Devise of a copyhold estate to three trustees, upon trust to permit A. to occupy the same, or receive the rents and profits

COPYHOLD.

thereof for his life; and after the death of A., upon trust to sell the estate, and divide the proceeds amongst the children of A.; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will:—*Held*, that the fines payable on the admission of the devisees in trust to the copyhold estate, were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyhold estate so devised. *Cole v. Jealous*, v. 51

3. Suit by a lord against a tenant of lands within the manor, to restrain the defendant from taking stone from lands in his occupation. The defendant by his answer alleged that it was, and had been, a common practice in the manor to remove the stone which laid immediately under the surface, for the benefit of cultivation. At the hearing, the Court made a decree for a perpetual injunction, the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff. *Cuddon v. Morley*, vii. 202

4. Form of order appointing a new trustee of a copyhold estate, and appointing a person to complete the assurance of the estate to such new trustee. *In re Hey's Will, and of the Trustee Act, 1850*, ix. 221

5. Devise of a copyhold to such uses as A. and B., or the survivor of them, or the executors or administrators of the survivor, or the trustees or trustee of the will for the time being, should by deed appoint; and, subject thereto, to the use of A. and B., their heirs and assigns for ever, with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, A. and B. sold the copyhold estate, in pursuance of the trusts. The lord of the manor required that A. and B., the devisees, should be admitted before the admission of the purchaser. On the bill by A. and B., the vendors, against the purchaser, to compel a specific performance of the contract, the Court *held*, that the copyhold tenant might direct the lord to admit into the tenancy either such person as A. should nominate, or A. himself; that it was the exercise of the right of the tenant to nominate alternately in favour of A. or the nominee of A., and not a double exercise of his right to nominate—first, in favour of A., and then in favour of the nominee of A.; and that the purchaser was bound specifically to perform the contract. *Glass v. Richardson*, ix. 698

6. The separate examination of a married woman *held* to be well taken for the

COPYHOLD.

purpose of aliening her copyhold estate by a deputy steward, who was a minor. *Eddleston v. Collins*, x. 99

7. The steward of a manor, although a minor, may execute the office, if he have sufficient discretion. *Ib.*

8. The duty of taking the examination of a married woman on the conveyance of her estate is not a judicial duty.—*Semble*. *Ib.*

COPYHOLDER.

See COVENANT.

COPYRIGHT.

See PIRACY.

1. Where the plaintiff had contracted to correct and complete from materials to be furnished by the defendant, a book which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration, according to the number of pages the work might contain; the Court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed) with any material alteration or omission; and also refused an injunction to restrain the defendant from printing, publishing, or selling the work, until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at law, and the title to it is not a ground for the interposition of a Court of equity. *Cox v. Cox*, xi. 118

2. *Semble*, unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. *Ib.*

CORPORATION.

See APPENDIX, vol. x, p. v—JOINT-STOCK COMPANY—JURISDICTION—LEGACY—PENALTIES—PLEADING—SPECIFIC PERFORMANCE.

1. Some forms prescribed for the government of a corporation may be imperative, and others directory only. *Foss v. Harbottle*, ii. 495

2. Where the charter of a Corporation has been granted with certain terms or provisions, and the charter is subsisting and unimpeached, notwithstanding it might be open to the Attorney-General or the Crown to take proceedings for setting it aside, the Court will still deal with the Corporation as having all the rights and

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powers of an existing body. *Robinson v. Governors of the London Hospital*, x. 24

3. Construction of the charter of the London Hospital, distinguishing the powers of donors to give, and the powers of the hospital to take. *Ib.*

CORPUS.

See CHARGE.

COSTS.

See ADMINISTRATION—ADMINISTRATION SUIT—AMENDMENT—APPENDIX, vol. x, pp. iii, x, xi, xlii, xliii, xliii—CONTEMPT—COPY OF BILL—COVENANT—CREDITORS' SUIT—DECREE—DEMURRER—DISMISSAL OF BILL—DOWER—EXECUTOR—FORMA PAUPERIS—GENERAL ORDERS, 1796, April 23; 1845, May, r. CXXXII—INJUNCTION—INTERPLEADER—JUDGMENT CREDITOR—JURISDICTION—MORTGAGOR AND MORTGAGEE—MOTION—NEXT FRIEND—ORDER—OUTLAWRY—PARTIES—PLAINTIFF—REMOTENESS—SEQUESTRATION—SERVICE—SOLICITOR—SOLICITOR AND CLIENT—STAY OF PROCEEDINGS—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. The Court will not, at the hearing of the cause, without a special application, order the plaintiff to pay the additional costs occasioned by a case made and allegations inserted in the original bill, which was struck out and abandoned by amendment. *Mounsey v. Burnham*, i. 22

2. The most convenient time for applications in respect of such costs, is immediately upon the cause of complaint arising; and the amount of the costs complained of is material in reference to the propriety of the application. *Ib.*

3. *A.* insisted by his answer, that *B.*, a claimant of the property in question, should be a party; *B.* on being made a party stated by his answer that he had given notice of disclaimer to *A.* before the suit began, but did not enter into evidence: the Court cannot determine the question of costs on the answers, but may direct an inquiry to ascertain when the notice of disclaimer was given. *Perkins v. Bradley*, i. 219

4. The Attorney-General on behalf of the Crown—defendant in a suit, claiming an interest in the goods of a felon convict, the subject of the suit, against purchasers for value, and failing in that claim, is not entitled to his costs out of the fund as a matter of course. *Ib.*

COSTS.

5. The provisional assignee of the Insolvent Court, made a defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs as the insolvent debtor himself would have been; and therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs from the plaintiff. *Appleby v. Duke*, i. 303

6. The official assignee and the creditors' assignee of a bankrupt, who are necessary parties to a suit for foreclosure in respect of their interest in the equity of redemption of premises of which the bankrupt was the mortgagor, and which are an insufficient security for the amount of the mortgages thereon, are not entitled to their costs of the suit from the plaintiff. *Cash v. Belcher*, i. 310

7. In a creditors' suit, the assignees of a bankrupt, who is a defaulting executor of the deceased debtor, are not entitled to their costs of the suit out of the testator's estate; but if the plaintiff sought to charge the assignees with the receipt of specific parts of the testator's estate, and failed to do so, the assignees might be entitled to costs. *Massey v. Moss*, i. 319

8. The plaintiff, in interpleader, must bear the costs of any proceedings which he may take in the suit that are productive of needless expense; and, therefore, where the plaintiff filed unnecessary affidavits, and entered into evidence in the cause, and obtained a second injunction *ex parte* to restrain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred. *Crawford v. Fisher*, i. 436

9. Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, i. 505

10. A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit, discharged of the expenses of it, although he might have been made a party without his authority. *Hall v. Laver*, i. 571

11. The employment of a solicitor in business relating to a trust estate, by the authority of the trustee, or of some of several cestui que trusts, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other cestui que trusts. *Ib.*

12. The lien of the solicitor upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit; and, therefore, *semble*, a solicitor who, in relation to the same estate, in which the same parties are interested, has brought an ejectment, and a suit in equity, has no lien upon the fund recovered in the suit for his costs of the ejectment. *Ib.*

13. It being admitted by the defendants in a suit against executors and parties charged with misapplying the trust property, that an account had been settled between the residuary legatee, the executor, and the other defendant, upon an erroneous footing, by which the other defendant was benefited and the residuary legatee was prejudiced, the Court, on dismissing the bill of the residuary legatee, on the ground that he had no title to the relief prayed, did so without costs. *Portlock v. Gardner*, i. 594

14. Where a plea to the bill is filed, and the plea is overruled, with liberty to amend, and the amended plea is put in and allowed, the defendant is not entitled to the costs of correcting his own mistake, but is entitled to the costs which he would have had if the plea which was allowed had been the plea which was first filed. *Clayton v. Meadows*, ii. 26

15. Under a general order of taxation, the Master will, without any special direction, exercise a discretion as to taxing the costs of informal proceedings. *Ib.*

16. On proof of some specific errors and overcharges in an account and bill of costs, inquiries were directed with respect to an account made up—and the balance of which was secured by a mortgage made thirteen years before the bill was filed. *Edwards v. Meyrick*, ii. 60

17. In an administration or creditors' suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debt; and the costs of the same executor incurred in the proper performance of the duties of his trust, after his bankruptcy or insolvency, will be allowed out of the estate. *Samuel v. Jones*, ii. 246

18. Separation of the costs occasioned by a defence, founded on a statement of fact, disproved by the evidence. *Bower v. Cooper*, ii. 408

19. Notwithstanding an order on further directions in a creditors' suit, that the costs of all parties should be taxed as between solicitor and client, and paid out of a fund in Court,—the fund proving insufficient to

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pay all the costs,—the Court ordered the costs of the executors to be paid in the first place. *Gaunt v. Taylor*, ii. 413

20. Where a defendant, having rendered himself liable to be sued, and being sued, offers to submit to all the relief to which the plaintiff is entitled, the Court will not give the plaintiff his costs of the subsequent prosecution of the suit. *Colburn v. Simms*, ii. 543

21. A plaintiff, who is entitled to have an account taken of profits unlawfully made by the defendant, is not bound to accept the statement of the account on affidavit instead of by answer, but may call for an answer from the defendant, without therefore disentiing himself to the costs in respect of the answer, although he afterwards waives the account. *Ib.*

22. The Act which enabled a company to purchase and take land for making a railway provided that the costs of the "contracts, sales, and conveyances" should be borne by the purchasers:—*Held*, that the vendors were, under these words, entitled to be reimbursed the costs of making out their title to the land purchased by the company. *Ex parte Feoffees of Addies' Charity, In re London and Greenwich Railway Company*, iii. 22

23. Under the Act enabling the Corporation of Trinity House to purchase property, and in certain cases to pay the purchase-money into Court, to be laid out in stock for the benefit of the parties entitled, providing that the "costs of the investment of the purchase-money" shall be paid by the Corporation, the broker's commission on the purchase of stock is a part of the costs of investment to be borne by the Corporation. *In re 6 & 7 Will. 4, Ex parte the Corporation of Trinity House*, iii. 95

24. The Attorney-General appearing in support of a bill for a legacy,—the bill being dismissed,—*held* not entitled to costs. *Gloucester (Mayor, &c.) v. Wood*, iii. 149

25. Costs given to the Bank of England out of a trust fund of Government stock, in the suit of the cestui que trusts for the application of the fund according to their interests although the decree was made against the Bank,—the Bank having acted upon a doubtful construction of a late Act of Parliament, before that construction had been settled by any judicial determination. *Bristed v. Wilkins*, iii. 235

26. Cases in which costs may be given to a plaintiff, out of an estate, notwithstanding the dismissal of the bill. *Westcott v. Culliford*, iii. 274

27. A relation of the parties entitled to the residue of the estate (if any) obtained

an order for opening biddings, but did not become the purchaser of the property on the re-sale. The property was sold at an advance beyond the first price added to the deposit. In the special circumstances of the case, the Court allowed the person who opened the biddings his costs. *Chapman v. Fowler*, iii. 577

28. The stat. 1 & 2 Vict. c. 110, ss. 16, 18, does not deprive a solicitor, who has attached his client for non-payment of costs, of his lien upon the fund which the solicitor has recovered. *Lloyd v. Mason*, iv. 132

29. An attachment of the client for the non-payment of costs is not a waiver of the lien of the solicitor on the fund which he has recovered in the suit in which the costs were incurred. *Ib.*

30. Costs to be paid to a party, ordered, after his bankruptcy, to be set off against costs ordered to be paid by the same party before his bankruptcy. *Lee v. Pain*, iv. 255

31. Where, on the same motion by which the purchaser asks to pay his purchase-money into Court, and be let into possession, it is also asked that one purchaser may be substituted for another, upon the affidavit of no underhand bargain, no additional costs are incurred by the parties to the cause, and costs are not ordered to be paid by the purchaser. *Christian v. Chambers*, iv. 307

32. The 47th Order of August, 1841, giving costs to creditors who prove their debts before the Master, does not affect the costs to which the plaintiffs in the cause are entitled. *Flintoff v. Haynes*, iv. 309

33. Costs given to the plaintiff, notwithstanding the bill, raising a question on the construction of a will, was dismissed. *Cooper v. Pitcher*, iv. 485

34. Costs given to the plaintiff out of the fund in question, directed to be set off against payments out of such fund erroneously made by the trustees to the use of the plaintiff. *Ib.*

35. Trustees and their cestuis que trust, and next of kin in the same interest, severing in their defences, entitled only to one set of costs, although stated (at the bar, but not by the answers) to reside in parts of the country remote from each other. *Farr v. Sheriffe; Dykes v. Farr*, iv. 528

36. Costs of a motion may be given, although the notice of motion does not ask that the order may be made with costs. *Powell v. Cockerell*, iv. 572

37. A defendant against whom the bill has been dismissed with costs, to be paid by the plaintiff, and received by the plain-

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tiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant. *Lander v. Ingersoll*, vi. 73

38. A plaintiff, suing in formā pauperis, brought his bill to redeem two estates, but was held to be entitled to redeem one estate only, and the mortgagee was allowed to add his costs of the suit, in respect of both estates, to the principal and interest due to him on the security of the redeemable estate. *Batchelor v. Middleton*, vi. 86

39. A defendant, whose motion to dismiss was answered by a replication, refusing to accept costs for preparing and serving the notice, and proceeding with his motion, —it was refused with costs, minus 20s. *Wright v. Angle*, vi. 109

40. The costs of exceptions to the answer of a defendant to a bill of discovery, which the Master, under the 19th Order of December, 1833, has certified ought to be borne by the defendant, are not within the 28th Order of April, 1828, or the 124th Order of May, 1845; but the Court will, upon application (ex parte), order such costs to be taxed and deducted from the costs of the suit payable to the defendant. *Hughes v. Clerk*, vi. 195

41. Motion by the executor of a defendant, as against whom a bill was dismissed with costs, since the stat. 1 & 2 Vict. c. 110, the defendant having died before taxation of his costs, that the Master might proceed with such taxation,—the suit not having been revived,—refused, with costs. *Robertson v. Southgate*; *Harmer v. Southgate*, vii. 109

42. Upon a motion by the defendant to dismiss the bill, upon payment or satisfaction to the plaintiff of the debt or claim made by the suit, and certain costs of the suit, the Court will, in some circumstances, determine the question of costs to be paid by the defendant, as where such question is purely collateral to the subject of the suit. *Penny v. Beavan*, vii. 133

43. The costs of the plaintiff in a creditors' suit, in opposing a motion to dismiss for want of prosecution by a party named executor, who had renounced probate and disclaimed, was refused to a creditor whose bill was dismissed, upon payment of his claim by the acting executor. *Ib.*

44. The mere offer from a defendant to pay a claim and costs (without motion), held, not to disentitle the plaintiff to his costs of the subsequent proceedings in the suit. *Ib.*

45. Costs of the day are not given, where a cause is ordered to stand over at

the hearing, owing to an abatement or imperfection of the suit, which happened after the cause was at issue. *Fussell v. Elwin*, vii. 29

46. Costs, where two estates, those of the testator and the executor, are administered in the same suit. *Culsha v. Cheese*, vii. 246

47. The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings had been drawn had been called within the bar. *Green v. Briggs*, vii. 279

48. In taxation between party and party, it is not the practice to allow the common retaining fee to counsel. *Ib.*

49. Before the 120th Order of May, 1845, the expense of attending the Master by counsel was not allowed between party and party, except on references for scandal. *Ib.*

50. The costs incurred in respect of conflicting claims of priority of lien or charge, in a suit for redemption and foreclosure by a puisne mortgagee, ordered to be paid by the parties who failed in such claims respectively, the plaintiff adding to his mortgage debt the costs paid by him in respect of such claim as he had failed in establishing,—the questions having arisen from the acts or conduct of the mortgagor. *Pelly v. Wathen*, vii. 372

51. A trust fund, consisting of a debt from the estate of a testator, was recovered in a creditors' suit by the cestuis que trust; in which suit the two trustees of the fund were defendants. The two trustees (for reasons which were not denied to be sufficient) appeared separately; and one of them dying before the cause was heard on further directions, it was held that he had acquired no lien for his costs on the trust fund in Court; and the petition of his personal representative, that his costs might be taxed, and provided for out of the fund, was refused, with costs. *Malins v. Greenway*, vii. 391

52. On a reference for an account of what was due to the defendant in respect of a lien on deeds, the Master found the amount; and the plaintiff thereupon offered to pay it, and terminate the suit, upon delivery up of the deeds, which offer the defendant refused to accept. The Court, on further directions, refused the defendant the costs of the proceedings subsequent to the offer. *Sentance v. Porter*, vii. 426

53. It is not irregular, in such a case, to bring before the Court, by motion, at the time of the hearing for further directions,

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circumstances affecting the right of the parties to costs in the cause. *Ib.*

54. Where a legacy has been severed from the general estate, and becomes the subject of a suit, by the result of which the estate will not be affected, the costs of the suit are borne by the fund constituting the legacy; but the appropriation or investment by the executor of a particular sum to answer the legacy, where the question which arises upon it is a question between the general estate and the legacy, does not relieve the general estate from the costs of the suit. *Attorney-General v. Lawes*, viii. 32

55. A party becoming trustee under a deed creating interests adverse to interests already existing, may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property. *Heap v. Tonge*, ix. 105

56. The costs incurred by a tenant for life, in making out the title to property taken by the Commissioners of Woods, &c., under the Metropolitan Improvement Acts, are not, upon the construction of sect. 49 of the Act 3 & 4 Vict. c. 87, within the description of "expenses of the purchases," payable by the Commissioners. *In re Strachan's Estate, and of the Metropolitan Improvement Acts*, ix. 185

57. The Court has no jurisdiction, under the Metropolitan Improvement Acts, to apportion the costs of a tenant for life in making out his title to property taken under those Acts between such tenant for life and the parties entitled in remainder, or to order payment of such costs out of the corpus of the purchase money, which is paid into Court, owing to the disability or incapacity of the parties entitled. *Ib.*

58. The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee, and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of Court. *Lincoln v. Windsor*, ix. 158

59. A mortgagee, after filing a foreclosure bill, unsuccessfully moving for a receiver, and rendering himself liable to the costs of the motion, died, and his executors, without reviving the suit, filed a new bill for foreclosure of the same estate:—*Held*, that the defendants, not by plea to the new bill insisting upon the former suit, but claiming by their answers the benefit of the objection as if they had pleaded it, the Court would not refuse the decree in the second suit, or stay the proceedings therein until the former costs should be paid. *Long v. Storie*, ix. 542

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60. But the Court, not approving of the course taken by the plaintiffs, will give them no costs of the second suit, unless they submit to pay the costs to which the mortgagee was liable in the first suit. *Ib.*

61. A vendor, after the contract, and before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase; and a suit for a specific performance of the contract against the trustees and the infant devisees of interests in his estate having become necessary, the Court made the decree without costs, there having been no default on either side. *Hinder v. Streeten*, x. 18

COSTS OF ADMITTANCE.

See COPYHOLD.

COUNSEL.

See COSTS—DISCOVERY.

COUNTRY SOLICITOR.

See SERVICE.

COURT OF BANKRUPTCY.

See INSOLVENT DEBTOR.

COURT OF LAW.

A question of general law, arising out of circumstances which are likely to occur in other cases, and the decision of which might affect the rights of other persons, is a case in which this Court may properly seek the opinion of a Court of law. *The Manchester, Sheffield, and Lincolnshire Railway Company v. The Great Northern Railway Company*, ix. 284

COURT OF REVIEW.

See JURISDICTION.

COVENANT.

See ACCOUNT—ADMINISTRATION—AGREEMENT—CHARGE—FORFEITURE—JOINT STOCK COMPANY—JUDGMENT CREDITOR—LEASE—LEGACY—MINES—MORTGAGE—PARTIES—PARTNERSHIP—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 1 Will. 4, c. 60—VENDOR AND PURCHASER—VOLUNTARY ASSIGNMENT—VOLUNTARY DEED.

1. The testator gave the residue of his estate to trustees, upon trust, to divide the same amongst the several persons who were

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his creditors at the time he executed a certain conveyance for their benefit, their executors and administrators; such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, rateably and in proportion to the quantum or amount of the original debt or debts due from him to such person or persons respectively: and if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of the testator's decease, such share or shares of the residue to go to certain residuary legatees:—*Held*, that the residue was to be divided into parts corresponding in number and proportion with the original debts. *Philips v. Philips*, iii. 281

2. That the shares attributed to the debts of creditors who died in the lifetime of the testator did not lapse by their death. *Ib.*

3. That the surviving partners were the persons to receive and give receipts for the share of the residue attributed to a joint debt, and that it was not necessary, before carrying over the shares in this suit, to inquire into the state of the accounts as between the surviving and the representatives of the deceased partners. *Ib.*

4. That a claim made by the representatives of a partner beneficially interested in a joint debt was a sufficient claim, although such partner was not the last survivor of the partners in the firm to which the debt was owing. *Ib.*

5. That the share of the residue attributed to a debt, in respect of which no claim was made, belonged to the residuary legatees. *Ib.*

6. That the amount of the residue, whether as exceeding or falling short of the amount of the unpaid debts, did not affect the construction of the will. *Ib.*

7. *Semble*, that the trust must be considered as proceeding upon a mixed principle of bounty and obligation; and that the will must be read as, to some extent, directing payment of debts. *Ib.*

8. *Quære*, as to the construction of such a bequest, if the debts had all been paid in full before the date of the will. *Ib.*

9. A lessor covenanted with his lessee for quiet enjoyment of the demised premises, and afterwards devised his real estate, subject to and charged with the payment of his debts. After the death of the lessor, the lessee was evicted, and brought his action of covenant against the executors of the lessor, who pleaded plene administravit; whereupon the lessee took out judgment of assets quando, &c., and procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the lessor, for satisfaction of the damages

and costs out of the real estate of the lessor devised by his will:—*Held*, that, although damages recovered in an action of covenant, brought in respect of breaches of covenant happening after the death of the testator, were not a debt within the statute of fraudulent devises (3 & 4 Will. & M. c. 14), yet they were a debt payable out of the real estate of the testator, under the charge of debts thereon created by his will. *Morse v. Tucker*, v. 79

10. That the devisees were not bound by the action brought, or the inquiry as to damages had, against the executors, but were entitled to have the question of the liability of the estate of the testator on the covenant tried in an action defended by the devisees themselves. *Ib.*

11. The lessee having recovered damages upon the covenant in the action directed by the Court, to which the devisees were parties, was *held* entitled as against the devisees, to the amount of such damages,—to his costs of the ejectment,—of the action brought against the executors,—of the action on the covenant to which the devisees were parties,—and of the suit, and also to interest on the damages and costs, to be computed from the time the amount was ascertained and judgment entered up in the action to which the devisees were parties. *Ib.*

12. A copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years, with a covenant for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having devised the premises to a trustee:—*Held*, on a bill by the lessee against the trustee for specific performance, that the trustee, having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts. *Worley v. Frampton*, v. 560

13. Whether, if the trustee had brought his bill for specific performance against the lessee, the lessee would have been compelled to perform the contract if the trustee had declined to covenant for renewal—*quære. Ib.*

14. Where a husband covenanted, by his marriage settlement, to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, exe-

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cutors, or administrators, and the husband afterwards died intestate—It was *held*, on the authority of *Crouch v. Stratton*, that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant, either wholly or *pro tanto*. *Salisbury v. Salisbury*, vi. 526

15. Covenants to repair after notice considered as distinct covenants. *Gregory v. Wilson*, ix. 690

COVENANT TO BUILD.

See SPECIFIC PERFORMANCE.

COVENANT TO INSURE.

See EQUITABLE JURISDICTION.

COVERTURE.

See INFANT—PORTION.

CREDITOR.

See ADMINISTRATION SUIT — COSTS — PARTIES—STATUTES, CONSTRUCTION OF, 13 *Eliz.* c. 5.

CREDITORS' SUIT.

See ADMINISTRATION — ADMINISTRATION SUIT—APPENDIX, vol. ix, p. lxxvii—COSTS — MISREPRESENTATION — STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60.

1. Inquiries of the propriety of the proceedings proposed to be taken for the beneficial management and realisation of the estate of a testator or intestate, will not be directed in a creditors' suit. *Collinson v. Ballard*, ii. 119

2. The plaintiff in a creditors' suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee, or a party entitled to a lien on the title-deeds. *Christian v. Field*, ii. 177

3. In a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate v. Field*, ii. 211

4. A mortgagee may sustain a suit against the executors of the mortgagor, for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator—*semble*. *King v. Smith*, ii. 239

5. A Court of equity restrains a creditor from enforcing his legal rights against the estate of his deceased debtor only upon the

CUMULATIVE LEGACY.

principle, that the creditor is enabled to bring into equity (with some specified exceptions) all his legal rights, and that the validity of his debt must be determined in equity upon the same principles as at law; and the circumstance, that the creditor is also the plaintiff in the cause, is not material as to the mode of determining the validity of such debt. *Whitaker v. Wright*, ii. 310

6. In the proof of a bond debt, before the Master, it is not the practice to require an affidavit of the consideration, unless a case of suspicion against the bond is raised. *Ib.*

7. Under a decree in a suit by a bond creditor on behalf of himself and the other creditors on the estate, the executor may, in the Master's office, impeach the validity of the bond upon grounds which were not in issue in the cause at the hearing. *Ib.*

8. The existence of a creditors' suit for the administration of the estate of a deceased debtor does not prevent the operation of the Statute of Limitations against a debt, in respect of which no claim is made under the decree—*semble*. *Tatam v. Williams*, iii. 347

9. In a creditors' suit the plaintiff did not establish his debt at the hearing; but the Court retained the bill, giving him liberty to bring an action. He produced other evidence, and recovered in the action. Decree for payment of the debt, and costs in equity; but no costs given of the proceedings at law. *Gregson v. Booth*, v. 536

CROSS ACTION.

See AGREEMENT.

CROSS BILL.

See APPENDIX, vol. x, p. xlv—PLEA.

CROSS DEMAND.

See EQUITABLE SET-OFF.

CROSS INTERROGATORIES.

See WITNESS.

CROSS REMAINDERS.

See CY PRES.

CROSS SUIT.

See SECURITY FOR COSTS.

CUMULATIVE LEGACY.

See ANNUITY—LEGACY—SUBSTITUTIONAL LEGACY.

CUSTOM.

CUSTODY OF INFANTS.

See NEXT FRIEND.

CUSTOM.

See COPYHOLD.

1. A decree by some against the others of the deputy day oyster meters, having the exclusive right of shovelling, unloading, and delivering oysters within the port of London, for an account and equal apportionment amongst the meters of the scorage dues received by them,—such decree being founded on the immemorial existence of the body of meters, which was *held* to be proved, notwithstanding the meters were originally labourers, and that they habitually described themselves as servants of the Corporation of London. *Thompson v. Daniel*, x. 296

2. Proof that there had been an equal division of the scorage dues received by the deputy day oyster meters for the last sixty years,—a former decree in a suit in which the common right of the meters was in question,—and earlier evidence that the meters were employed by turns, *held* to be sufficient to show that they were entitled to an equal division among themselves of the scorage dues which they received. *Ib.*

3. It being proved, that, for at least sixty years past, the affairs of the deputy day oyster meters had been regulated by themselves, and there being no evidence of any interference with the body either by the yeomen of the waterside or the Corporation, it was *held* that the deputy day oyster meters had the right of making bye-laws and regulations binding on their body, as to the manner in which their duties should be performed. *Ib.*

4. *Held*, also, that however it might be competent to the Corporation of London, in such corporate character, or as representing the yeomen of the waterside, to alter the rights and duties of the office of the deputy day oyster meters; yet it was not competent to the Corporation, in exercising the mere power of appointing meters, to appoint one who should hold his office upon terms inconsistent with those which were prescribed by the regulations of the body of meters. *Ib.*

5. That the Court would not charge the defendants with default in declining to receive an additional payment per peck for the services of the holdsmen, which many buyers would voluntarily pay, but to which the meters were not lawfully entitled; and would, on the other hand, allow the defendants such reasonable payments as they had made for the labour of the holdsmen,

CY PRES.

by whom the duty of shovelling, unloading, and delivering the oysters was performed. *Ib.*

CY PRES.

1. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives; and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors and survivor, others or other of them, as tenants in common, if more than one; and for default of such issue, over. A. had three children born in the lifetime of the testator, and living at his decease, and one born after the testator's death. One of the three born in his lifetime died during the life of A. without issue:—*Held*, that the children of A. took as tenants in common, and not as joint tenants. *Vanderplank v. King*, iii. 1

2. That, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près* or approximation, by giving an estate tail to the after-born child of A. *Ib.*

3. That the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it; and that therefore, although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime would take estates for life, and the estates devised to the children of the after-born child would alone be altered. *Ib.*

4. That cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took, according to their respective estates, the share of the child of A. who died without issue; and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Ib.*

CY PRES.

CY PRES APPLICATION.

See CHARITABLE BEQUEST.

CY PRES DOCTRINE.

See DEVISE.

DAMAGE.

See INJUNCTION—STATUTES, CONSTRUCTION OF, 8 *Vict.* c. 20, s. 6.

DAMAGES.

See ADMINISTRATION SUIT—AGREEMENT—COVENANT—PARTNERSHIP.

DEAN AND CHAPTER OF A CATHEDRAL CHURCH.

See JURISDICTION.

DEATH OF DEVISEE OR LEGATEE BEFORE TESTATOR.

See STATUTES, CONSTRUCTION OF, 7 *Will.* 4 § 1 *Vict.* c. 26, s. 33.

DEATH OF LEGATEE.

See STATUTES, CONSTRUCTION OF, 7 *Will.* 4 § 1 *Vict.* c. 26, ss. 3, 24, 33.

DE BENE ESSE.

1. An ex parte order for the examination de bene esse of a witness about to go abroad is regular. *M'Intosh v. Great Western Railway Company*, i. 328

2. A motion to suppress depositions taken under an order for the examination of a witness de bene esse, not asking to discharge that order, is not supported by showing circumstances from which it would merely appear that the order was irregular; for the Court will assume, for the purpose of the motion, that the order was regular.

Ib.

DEBT.

See ADMINISTRATION—CREDITORS—EQUITABLE SET-OFF—JURISDICTION—SATISFACTION—SET-OFF.

Decree for account in a creditors' suit, seeking to charge the real and personal estate of the testator, where the debt of the plaintiff was admitted by the executors and trustees, and by such of the parties beneficially entitled as were sui juris, but one defendant was a married woman, and another an infant, and there was no evidence of the debt, except the admission. *Hughes v. Eades*, i. 486

DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR.

See ADMINISTRATION SUIT—ASSIGNMENT—EQUITABLE SET-OFF—EXECUTOR—HUSBAND AND WIFE—INSOLVENT DEBTOR—PRINCIPAL AND AGENT—PRINCIPAL AND SURETY—SET-OFF—STATUTES, CONSTRUCTION OF, 3 § 4 *Will.* 4, c. 104; 1 § 2 *Vict.* c. 110, ss. 14, 15—TRUSTEE AND CESTUI QUE TRUST.

1. The legal effect of acknowledging a debt barred by the Statute of Limitations is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise. *Philips v. Philips*, iii. 299

2. Merely voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity. *Cross v. Sprigg*, vi. 552

3. Unless there be a consideration, or some other equitable ground of distinction, equity in such a case follows the law. *Ib.*

4. A., being indebted to a larger amount than his personal estate was sufficient to pay, died intestate as to his real estate, which descended upon his daughter and heiress-at-law, a minor. The daughter married during her minority, having entered into articles to settle the estates, upon attaining her majority, for the benefit of the parties to and the issue of the marriage, with power to vary the settlement within six months after she attained her age of twenty-one years. After the said six months had expired, the estates were settled with power of revocation; and, by a subsequent deed, the uses were revoked, and the same estates were appointed to trustees for sale and payment of the debts of A., and subject to such trusts, for the benefit of the husband and wife, and issue of the marriage. After the death of the wife, the deeds of settlement and appointment were set aside at the suit of one of the children of the marriage, and the estates decreed to be reconveyed to the uses expressed in the articles:—*Held*, subsequently, in a suit by a creditor of A., that the real estate was subject to the payment of such parts of A.'s debts as his personal estate was insufficient to pay. *Pimm v. Insall*, vii. 193

5. A conveyance for the benefit of creditors held not to be revocable by the author, as against any creditors with whom

DEBTOR AND CREDITOR.

such communications had taken place, as would give them an interest under the deed, but, at the utmost, to be revocable only as to the surplus proceeds of the estate, after satisfying such creditors; and, whether the deed was revocable at the option of the author, as to such surplus—*quære*. *Griffith v. Ricketts*; *Griffith v. Lunell*,
vii. 307

6. A debtor executed a deed, expressed to be for the better management of his affairs and for the liquidation of his debts and engagements, and he thereby conveyed and assigned his real and personal estate and effects to one of his creditors, leaving it to the discretion of the creditor in what order and in favour of what creditors the proceeds should be applied, and giving him powers of management and sale, and to negotiate and enter into arrangements and apply the proceeds of the estate and property in carrying them into effect, such powers to terminate with his life, or upon his resignation; and the debtor then went abroad, that the arrangement of his affairs might be facilitated by his absence. The Court, upon such circumstances, *held*, that the deed was not framed to secure any debt due to the creditor to whom the conveyance and assignment was made; and that the deed (independently of the grantee being a creditor, and of any communication with other creditors) was a mere deed of management; that it was competent to the debtor to revoke it; and that it was fraudulent and void against other creditors. *Smith v. Hurst*,
x. 30

7. A creditor cannot vest his property in one of his creditors for the purpose of protecting himself against his other creditors. A deed executed for such a purpose is fraudulent and void against the latter, and the creditor taking such a conveyance is a party to the fraud, and cannot be in a better position than the debtor. *Ib.*

8. In the case of a deed vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but, in cases of deeds purporting to be executed for the benefit of creditors, the question, whether the trusts can be revoked, altered, or modified, depends on the circumstances of the case; and, therefore, when it appeared that communications had taken place with creditors of the grantor not parties to the deed, the Court, in treating the deed as against the parties to it as fraudulent, directed inquiries as to the interests of the creditors not parties. *Ib.*

9. A deed which a debtor has power to revoke, and which he attempts to use as a shield against his creditors, cannot be

otherwise than fraudulent and void against them. *Ib.*

10. The Court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title; and, therefore, where the plaintiff had obtained judgment, but had not sued out an *elegit*, it was *held* that he was not entitled to the aid of the Court as against the freehold estate of the debtor; that he did not, under the statute 1 & 2 Vict. c. 110, s. 13, become entitled to such aid until the expiration of one year from the time of entering up his judgment; and that this, being an objection that the plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the Court to relieve against fraud in respect to the freehold estate. *Ib.*

11. The Court will interpose to remove legal impediments out of the way of judgment creditors, or for the preservation of the property pending disputes at law as to the rights of judgment creditors; but the Court does not supply or extend legal rights. *Ib.*

12. A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; and the creditors, in consideration thereof, granted to the debtor license to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels, and effects, by any such creditors; and that, in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such license, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—*Held*, that this amounted only to a license by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed,—nor an administration suit by the creditor against the estate of the debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed or amounted to an acquittance of the debt. *O'Brien v. Osborne*,
x. 92

13. *Held*, also, that the existence of the trust deed, and the covenants and license therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts, for the payment of which the trust was created. *Ib.*

14. A creditor, at the date of a deed of inspectorship and trust, made by a debtor for the benefit of his creditors, had a claim against the debtor for an ascertained sum of £1974, and an unascertained sum on

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account of acceptances which he had given to the debtor on goods shipped by the debtor through the creditor as his factor on a *del credere* commission, and which had not then been sold, of which acceptances £5000 had then become due; and the creditor, in this state of things, executed the deed generally, without specifying on the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold, it appeared that a balance of £5348 was due to the creditor from the debtor:—*Held*, that the creditor was entitled to a dividend from the debtor's estate for the sum of £5348, and not merely for the sum of £1974. *Graham v. Ackroyd*,
x. 192

15. The testator devised certain estates to trustees for the payment of his debts, and appointed the same trustees his executors, and devised other estates in various portions, some to the same trustees for the separate use of married women for life with remainders over, others to devisees in fee, and others to devisees for life with remainders over in tail, and of some of which estates the testator created terms for raising specific sums of money, and others he charged with legacies and annuities. The testator died in January, 1843. On a bill filed in August, 1849, by the payee of a promissory note made by the testator (on which it was proved that interest had been paid by the executors up to 1847), for payment of the note out of the real as well as the personal estate, against the executors and trustees, some of whom were insolvent, against the residuary legatees who had received payments on account of their residuary shares, and against the parties beneficially interested in the real estate, of whom some set up the Statute of Limitations in bar of the demand, some omitted to do so, and others were out of the jurisdiction. *Fordham v. Wallis*,
x. 217

Held, that payment of interest is an acknowledgment of a debt; and, upon a general acknowledgment of a debt where nothing is said to prevent it, a general promise to pay is to be implied: and such an acknowledgment made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters, and not to one only; for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of executor or trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made, and not what is its extent or effect. *Ib.*

16. That the payment of interest of a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons, they filled different characters; and where the payment was made by them in the character of executors only, the real estate was not affected by it. *Ib.*

17. That the creditor was entitled to a decree as against the parties beneficially interested in the real estate who had omitted to claim the benefit of the Statute of Limitations. *Ib.*

18. That the heir or devisees of the real estate of a testator might themselves take proceedings for securing the due application of the personal estate in the payment of the debts, and in exoneration of the real estate; and that they cannot, therefore, after a lapse of time, successfully resist the claim of a creditor, as against the real estate, on the ground of his laches in not suing earlier for the recovery of the debt. *Ib.*

19. That the demand of a simple contract creditor as against the real estate of a testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to preclude the operation of the statute, by the effect of any right, which might exist or might have existed among the parties, to have the assets of the testator marshalled. *Ib.*

20. That payments by executors to residuary legatees, whilst the debts of the testator remained unpaid, was a breach of trust; and that, the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor, as against the residuary legatees, to the extent of their interest in the residue, and they must therefore refund the monies they had received on account of the estate. *Ib.*

21. A debt is not to be kept alive against one party by the admission of another, except in cases of continuing joint contract. *S. C.*,
x. 228

22. The existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property. *Ib.*

23. That parties who being joint and several debtors had not availed themselves of the statute, and have been held liable to the debts which the statute would have barred, cannot insist upon contribution from other joint and several debtors, who have protected themselves by setting up the statute from their liability in respect of the same debts—*semble*. But whatever the right to such contribution may be, it

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does not entitle the creditor to insist upon its application as against the debtors, who have so protected themselves. *S. C. x. 231*

24. A testator charged his debts and legacies upon his estate generally, and devised and bequeathed the residue to his six sons as tenants in common, giving his executors powers of sale. One of the sons, who was the only acting executor, was in partnership with another person, and paid debts of the testator, with monies advanced by the partnership; he also purchased the residuary shares of several of his brothers; and he borrowed money from the plaintiff, and deposited with him the title deeds of real and leasehold estates of the testator, by way of security for the same, with a note undertaking to make over such property to the plaintiff when required. The partnership became bankrupts, and a deed was made conveying the residuary estate of the testator to trustees upon trust, among other things, to repay to the assignees of the bankrupts the advances made to the executor by the firm:—*Held*, in the circumstances of the case, that the contract for security between the plaintiff and the executor was not for an equitable mortgage of the testator's estate comprised in the deposited deeds, under the powers given to the executors by the will, but was a contract for an equitable mortgage of no more than the beneficial interest of the executor therein. *Huynes v. Forshaw*, xi. 93

25. That although debts of the testator had been paid by means of the advances made by the partnership to the executor, and although the assignees of the bankrupts might possibly be entitled to stand in the places of the creditors so paid as against property still remaining in the hands of the executor, they could not so stand in the places of such creditors as to possess the rights which those creditors originally had, of following the property of the testator which had been aliened by the executor for his own purposes or benefit. *Ib.*

26. That the plaintiff was entitled to have the estate of the testator marshalled, so that the subsisting debts and charges thereon might be thrown in the first place on the residuary estate of the testator, not comprised in the original mortgage. *Ib.*

27. A debtor having contracted to purchase an estate, caused the conveyance to be made to trustees and trusts to be declared by deeds, dated in March, 1850, which recited the agreement of the debtor for the purchase, and that the conveyance to the trustees was by his direction, and declared the trusts to be for the sale of the property, and retaining the proceeds for the benefit of the wife and children of the debtor. By one of the deeds of March,

1850, the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts, for his wife and children. The debtor was, at the date of these deeds, indebted to an extent which would render a voluntary disposition of his estate fraudulent under the stat. 13 Eliz. c. 5, as against creditors. The trustees were not informed of the assignment of the furniture to them, and it continued in the possession of the debtor, until the subsequent assignment next mentioned. By a mortgage deed, dated in November, 1851, the debtor conveyed and assigned all his real and personal estate to a creditor, to whom he had, after the date of the voluntary deeds of March, 1850, become largely indebted, to secure, so far as it would go, the debt owing to such creditor; and the creditor thereupon took possession of the furniture:—*Held*, that, although the purchased estate was never vested at law in the debtor, yet, as he had by the contract acquired an equitable interest in it, which interest was conveyed to the trustees under the voluntary deeds of March, 1850, such conveyance was fraudulent as against creditors under the stat. 13 Eliz. c. 5. *Barton v. Vanheythuysen*; *Stone v. Vanheythuysen*, xi. 126

28. That the assignment of the furniture by the voluntary deed of March, 1850, was also fraudulent as against creditors. *Ib.*

29. That, as against the creditor entitled under the mortgage by the debtor of all his real and personal estate by the deed of November, 1851, although it did not specify in particular the purchased estate comprised in the voluntary deeds of March, 1850, those deeds were, as to such purchased estate, fraudulent and void, under the stat. 27 Eliz. c. 4; and, that that estate passed to such creditor by the mortgage deed of November, 1851. *Ib.*

30. That the furniture assigned to trustees by the voluntary deed of March, 1850, did not pass by the assignment of all the personal estate of the debtor by the mortgage deed of November, 1851; and that the creditor claiming under that deed did not acquire any specific lien or title to such furniture, either by the said deed or by the act of taking possession thereof. *Ib.*

31. A testator wrote in his account book, opposite an entry of two debts owing to him by his brother—one being due upon mortgage, and the other upon a promissory note—the words, "Not to be enforced;" but he received interest upon both debts for several years after the date of the entry, and up to the time of his death. The document which contained the words referred to was not propounded as testamentary:—

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Held, that this memorandum of the testator did not amount to a discharge of either of the debts. *Peace v. Hains*, xi. 151

32. *Semble* — The cases in which the Court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, are—

1. Where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor.

2. Where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having, in the event, been performed.

3. Where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under his own disposition, take or represent his interest upon his death, and relied upon their fulfilment of his intention; and,

4. (in strictness belonging to another class of cases), where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one in loco parentis, or is part of a family arrangement. *Id.*

DEBTS UNASCERTAINED.

See ADMINISTRATION.

DECLARATION.

See DECREE—STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60.

DECLARATION OF TRUST.

See ADMISSION AND DISCHARGE—VOLUNTARY PROMISE.

DECLARATIONS.

See DEBTOR AND CREDITOR.

DECLARATIONS OF TESTATOR NOT TESTAMENTARY.

See DEBTOR AND CREDITOR.

DECLARATORY DECREE.

See APPENDIX, vol. x, pp. xii, xiii, xiv.

DECREE.

See ACCOUNT—APPENDIX, vol. ix, p. lxvii; vol. x, pp. xvi, xxvii, xlv—APPORTIONMENT OF RESIDUE — BANKRUPTCY — CREDITORS' SUIT—DEFENDANT—EVI-

DECREE.

DENCE — JURISDICTION — MORTGAGOR AND MORTGAGEE—MOTION—OCCUPATION RENT—PARTIES OUT OF THE JURISDICTION—PAYMENT INTO COURT—PAYMENT OUT OF COURT—PLEADING—PRIORITY OF INCUMBRANCERS — STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60, s. 2—STAY OF EXECUTION—SUPPLEMENTAL BILL—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. The form of the decree, on dismissal of a bill with costs, ordered to be altered by adding the words "*to be paid by the plaintiffs*;" with reference to the 1st Order of the 10th of May, 1839, giving a remedy by *fieri facias* or *elegit* for costs ordered to be paid. *Taylor v. Jardine*, 316

2. Where a decree directing an act to be done, has been drawn up without fixing a time within which the act is to be done, the decree is not rendered ineffectual by the operation of the 11th and 12th Orders of August, 1841; but the Court will, upon motion for that purpose, fix a time for the performance of the act. *Needham v. Needham*, i. 693

3. Form of decree for taking the accounts in an administration suit, in case all the persons interested should not be parties at the hearing. *Fisk v. Norton*, ii. 381

4. Decree for specific performance of an agreement for the purchase of part of the estate comprised in a mortgage which had been assigned to the plaintiff; and for redemption of the remainder of the estate by the defendants, according to their priorities, or for successive foreclosures; and in case of redemption by the prior mortgagees in their order, then for redemption by the subsequent mortgagees successively, or for their successive foreclosure. *Sober v. Kemp*, vi. 160

5. Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the Court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the Master to approve of a settlement in conformity with the will, articles, or other direction upon which it is to be founded. *Williams v. Teale*, vi. 254

6. The Court gave some of the defendants the option of taking an issue on a question of fact arising in the cause, and dismissed the bill against another defendant. The option not being declared, owing to the death of one of the defendants between the hearing and the judgment,—on the application of the defendant who was ordered to be dismissed, the Court directed a separate decree to be drawn up as to that defendant. *Belsham v. Percival*, viii. 157

7. The death of a defendant between the

DECREE.

hearing of the cause and the judgment does not render a bill of revivor necessary prior to drawing up the decree. *Ib.*

DEED OF SETTLEMENT.

See JOINT-STOCK COMPANY.

DEED.

See APPENDIX, vol. ix, pp. xi, lxviii—CONSTRUCTION—DISCOVERY—JURISDICTION—LIEN—VENDOR AND PURCHASER.

1. The question whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other. *Harman v. Richards*, x. 81

2. Evidence of surrounding circumstances on which the Court held a settlement, that standing alone would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase-deeds of even date, to which some only of the same persons were parties. *Ib.*

DEFAULT.

See LIFE ASSURANCE.

DEFAULT IN PAYMENT OF INSTALLMENTS.

See SPECIFIC PERFORMANCE.

DEFECTIVE EXECUTION OF POWER.

See APPOINTMENT.

DEFECTIVE INFORMATION.

See EQUITABLE JURISDICTION.

DEFENDANT.

See ABSCONDING—AMENDMENT—ANSWER—COSTS—INTERPLEADER—JURAT—JURISDICTION—MOTION—PLEADING—SETTING DOWN CAUSE—TAXATION—WITNESS.

If a defendant, who has been examined by the plaintiff as a witness in the cause, submits to a decree against himself, notwithstanding such examination, the fact of that examination having been had cannot be sustained by the other defendants who have not been examined, as an objection to a decree against them. *Smith v. Smith*, vi. 524

DEMURRER.

DEFENDANTS OUT OF THE JURISDICTION.

See REHEARING.

DELIVERY UP OF DEED.

See PRIORITY OF INCUMBRANCES.

DELIVERY UP OF INSTRUMENTS, &c.

See BILL OF EXCHANGE—SHIP.

DEMISE.

See ESCHEAT.

DEMONSTRATIVE LEGACY.

See LEGACY.

DEMURRER.

See ANSWER—DISCOVERY—EQUITABLE JURISDICTION—GENERAL ORDERS, 1841, August, r. XXXVII—IMPROVEMENTS—JOINT STOCK COMPANY—JURISDICTION—OUTSTANDING TERM—PARTNERSHIP—PLEADING—TENANT FOR LIFE AND REMAINDERMAN—VENDOR AND PURCHASER—WITNESS.

1. A trustee will be restrained by this Court from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, and therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although the plaintiff may have a remedy at law. *Balls v. Strutt*, i. 146

2. On argument of a demurrer, facts not averred in the bill, and which might possibly have been denied by plea, if they had been averred,—intended against the pleader. *Foss v. Harbottle*, ii. 503

3. The plaintiff cannot, on demurrer, sustain the bill by waiving the relief prayed against the demurring defendant. *Griffith v. Ricketts*, iii. 476

4. Where, consistently with the statements in a bill of revivor, the defendant might have been made a party either to receive or pay what was due to her from the estate of which she was the representative, or to account for her own receipts, but it did not appear whether she was a party for any of such purposes, or in what character she was brought before the Court, her demurrer was allowed. *Ib.*

5. If the causes of demurrer assigned include the ground of objection upon which the demurrer is allowed, so that the demurrer allowed is not a demurrer *ore tenus*, the costs will be given, although the demurrer does not specifically point out the objection upon which it succeeds—*semble*. *Lund v. Blanshard*, iv. 23

DEMURRER.

6. A defendant, served with a copy of the original bill under the 23rd Order of August, 1841, did not enter an appearance. At the hearing, leave was given to amend the bill, by adding parties; the same defendant was served with a copy of the amended bill, and thereupon he appeared and demurred:—*Held*, on motion, that the demurrer of the defendant in the stage to which the cause had arrived, was irregular, and must be taken off the file. *Powell v. Cockerell*, iv. 565

7. Where the defendant omitted to give the plaintiff notice at the proper time that a demurrer to the bill had been filed, and the plaintiff irregularly obtained an order as of course to amend his bill, on or before a certain day, which order he obtained after twelve days from the filing of the demurrer; but within twelve days from the time he received the notice, the Vice-Chancellor, on a special motion (made after the expiration of the former order), restored the bill, and gave the plaintiff leave to amend; but the Lord Chancellor, on appeal, discharged the order. *Matthews v. Chichester*, v. 207

8. To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost-books or registers of the mines, and that the defendant had refused to accept such evidence, but not alleging that the plaintiff was unable to give other evidence of his title,—the defendant demurred:—*Held*, that, as the plaintiff was not precluded from giving other evidence of his title, if necessary, the demurrer must be overruled. *Curling v. Flight*, v. 242

9. By the effect of the 37th General Order of August, 1841, the answer put in by a defendant to an original bill, although it extends to matters retained in the amended bill, does not preclude the defendant from demurring generally to such amended bill, by overruling the demurrer, as it would have been held to do before that order was made. *Willie v. Ellice*, vi. 505

DEPOSIT.

See SPECIFIC PERFORMANCE — VENDOR AND PURCHASER.

DEPOSIT OF TITLE DEEDS.

See PRIORITY OF INCUMBRANCES.

DEPOSITIONS.

See APPENDIX, vol. ix, p. lxviii; vol. x, p. xlv—BILL TO PERPETUATE TESTIMONY—EVIDENCE.

DESCRIPTION.

DESCENT.

See MALE LINE.

DESCRIPTION.

1. A gift by the testator to his first cousin, Vincent B., the son of his late uncle Peter B. The testator had no cousin named Vincent B. who was the son of his late uncle Peter; but he had a first cousin named George Vincent B., who frequently visited and dined with him, whom he commonly called "Vincent," and who was the son of a deceased uncle named Joseph. The son of Peter was named Frederick, and was not in the habit of visiting the testator. The Court admitted evidence of these extrinsic circumstances, and *held*, that the testator was mistaken in the description rather than in the name of the legatee; and that George Vincent B., the son of Joseph, was entitled to the legacy. *Bernasconi v. Atkinson*, x. 345

2. *Held*, also, that the evidence of the solicitor who prepared the will, that the testator had by his instructions expressly indicated that George Vincent B. was the person for whom the legacy was intended, and that he (the solicitor) had inserted the description without the direction of the testator, and in a mistaken belief of the parentage of the legatee, was not admissible. *Ib.*

3. Where a legatee is pointed out by name and description, and there is no person to whom the name and description both apply, but the name only applies to one, and the description only applies to another, the Court will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by the testator, and will not hold the bequest void for uncertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other. *Ib.*

4. A., who, under a deed made by his father, was entitled, upon his father's death, to a moiety of his personal estate, assigned to trustees in these words:—"All the property of which he now is or may stand possessed, both real and personal, and now consisting of one note of hand for £120, one other note of hand for £40; one cottage in his own possession, sold to S. at his decease for £155, two other cottages in the occupations of F. and W." upon certain trusts, for his wife and relations. A. afterwards died in the lifetime of his father. Upon the death of the father,—*held*, that the trustees under A.'s assignment were entitled to take under that

DETAINDER.

instrument the moiety of the father's personal estate. *Choyce v. Oltey*, x. 443

DETAINDER.

See PRISONER.

DEVIATION.

See ACCOUNT.

DEVISAVIT VEL NON.

See HEIR-AT-LAW.

DEVISE.

See CONSTRUCTION—CONTINGENT REMAINDER—COPYHOLD—ESTATE IN FEE—LEGAL ESTATE—MINES—MISTAKE—POWER—REMOTENESS—VOID DEVISE.

1. Devise to a corporation and other trustees upon trust to distribute the rents and profits annually, on a certain day, amongst certain families, according to their circumstances, as in the opinion of the trustees they might need such assistance, whose names were thereafter mentioned, viz. (naming twenty-four persons):—*Held*, first, not necessarily void for uncertainty; secondly, not void as tending to create a perpetuity; and, thirdly, a beneficial interest in persons who might lawfully take land by devise, and therefore not void within the Statute of Mortmain. *Liley v. Hey*, i. 580

2. A general residuary devise and bequest of real and personal property, for such estate and interest as the testator had therein; the personal estate to be subject to the testator's debts:—*Held*, to pass the legal estate in real property, of which the testator was merely trustee, the will creating no inconsistent trusts thereof. *Langford v. Anger*, iv. 313

3. A testator, entitled in fee to some messuages and lands in A., and entitled for life to other messuages and lands in A., devised his messuages and lands in A. to his son, and charged his tenement in A., occupied by H., with certain legacies. The tenement occupied by H. was part of the property in A. to which the testator was only entitled for life:—*Held*, that it was not to be inferred, from the description as his own of the tenement in A. occupied by H., that the testator intended to describe and devise as his own the other property in A., in which he had only an estate for life. *Parker v. Carter*, iv. 400

4. A. devised his estates to B., his son, for life; remainder to the first and other sons of B. in tail; remainder to his daughters as tenants in common; remainder

DEVISE.

to C. for life; remainder to D., the son of C., if living at C.'s death, for life; remainder to the first and other sons of D. in tail; remainder to the male heir for the time being entitled to a certain family estate; remainder to the first and other sons of such male heir; remainder to the testator's own right heirs, of his name: and he directed the residue of his personal estate to be laid out in lands, to be conveyed to the same uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will; but by his will he directed that certain real and personal estate should be conveyed and assigned to the trustees under the will of A. upon the trusts of that will, or such of them as could then be executed; adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate: and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. On the death of B. without issue, C. entered into possession of the real estate devised by both wills, and the personal estate bequeathed by the will of B. At the death of C., D. entered into possession of the same real and personal estate. D. died without issue, and at his death there was no male heir entitled to the said family estate:—*Held*, that the ultimate limitation in the will of A. to his right heirs, of his name, vested at his death, and not at the death of D. *Wrightson v. Macaulay*, iv. 487

5. That the co-heiresses at law of B. (or the parties claiming under them) were entitled to the real estate so devised by the wills of A. and B. *Ib.*

6. That, inasmuch as the estates were made equitable by the will of B., the Court might properly send a case to a Court of law, to try at the same time the right under the will of A. as well as under the will of B. *Ib.*

7. That the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into, and to have descended as, real estate. *Ib.*

8. Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M., successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease,

DEVISE.

for T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease, for the first son of T. G. M. and the heirs male of his body; and in default of issue of the body of the said T. G. M., for every other son of T. M. successively, for the like estates and interests; and, on failure of all such issue of the body of T. M., upon trust for him, his heirs and assigns, for ever; provided that, if P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust, for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates, upon trust, for his wife for her life; and from and after her decease, upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—*Held*, that P. M. took an estate for life only. *Monypenny v. Dering*, vii. 568

9. That T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate. *Ib.*

10. That the eldest son of T. G. M. took a contingent remainder in tail, after the determination of the life estate of his father. *Ib.*

11. A will, made after the Wills Act, 1 Vict. c. 26, whereby the testator gave, devised, and bequeathed all his estate and effects, whatsoever and wheresoever, and of what nature or kind soever, to A., to be paid, assigned, or transferred to him on his attaining twenty-one:—*Held*, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will, that, in the meantime, the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary, in the maintenance, education, and putting forth of A. in the world, and should invest the said estate and effects on real or personal security at their discretion. *Stokes v. Salomons*, ix. 75

12. The directions applicable only to personal estate may, in such a case, be construed as referring not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personalty, to which such directions may be fitly applied. *Ib.*

13. The words, "I bequeath to my sons A. and B., and likewise constitute and

ordain them my sole executors of this my will, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed:"—*Held*, not to be a devise in fee. *Bromitt v. Moor*, ix. 378

14. A residuary devise of all the testator's estate, personal and real, although made subject to the payment of his debts, passes the legal estate in premises of which the testator was mortgagee in fee, notwithstanding the case of *Silvester v. Jarman*. *In re John Field's Mortgage, and of the Trustee Act, 1850*, ix. 414

15. Devise and bequest of real and personal estate to trustees, upon trust for the testator's daughter, for her life (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and, in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns ex parte maternâ, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for her daughter:—*Held*, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir ex parte maternâ was the heir at the death of the testator, and that the daughter was such heir; and the Court directed a conveyance to her accordingly. *Rawlinson v. Wass*, ix. 673

16. A devise to trustees of certain copyhold estate, and all other the real estate of the testatrix, and a declaration of the trusts of the monies to arise from the sale of such copyhold estate, and a general devise of all other her real estate to three persons as tenants in common:—*Held*, not to pass the legal estate of the testatrix in certain copyholds, of which she was merely trustee. *In re Morley's Will*, 293

17. Devise of real estates upon trust to pay the rents and profits unto or to the use of R. L. and his assigns, for his life, from and after his decease, unto the first and other sons of R. L.; and, in default of such issue, in trust for the first and other daughters of R. L.; and in default of such issue, to pay the rents and profits as therein mentioned; and an ultimate remainder over:—*Held*, that R. L. did not take an estate tail in the devised premises, nor an estate for life with remainder to his first and other sons successively in tail, nor an estate for life with remainder to his first son in fee. *Bridger v. Ramsey*, 320

18. The 28th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26), which enacts, that, "where any real estate shall be devised to any person without any words of

DEVISE.

limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of," applies to the devise of an existing estate or interest, and not to an estate or interest which the testator, by his will, creates de novo; and therefore a gift by will since the statute, of an annuity to A., without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, and is a gift of an annuity for life only, as it would have been before the statute. *Nichols v. Hawkes*, x. 342

DEVISE TO DECEASED CHILD.

See STATUTES, CONSTRUCTION OF, 7 Will. 4 § 1 Vict. c. 26.

DEVISEE.

See CHARGE—COSTS—DEBTOR AND CREDITOR—DISCOVERY—GENERAL ORDERS, 1841, August, r. xxx.

DEVISEE AND EXECUTOR.

See COVENANT.

DEVISEE OR TRUSTEE.

See STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27, s. 26.

DEVISEE IN TRUST.

See TRUSTEE AND CESTUI QUE TRUST.

DILIGENCE.

See TRUSTEE AND CESTUI QUE TRUST—INTERPLEADER.

DIRECTION FOR SERVICE OF DECREE OR ORDER.

See APPENDIX, vol. ix, p. xiii.

DIRECTORS.

See JOINT-STOCK COMPANY.

DISCHARGE.

See ADMISSION—ARREST—MOTION—PRISONER.

DISCHARGE OF DEBT.

See DEBTOR AND CREDITOR.

DISCHARGE OF SOLICITOR.

See LIEN.

DISCOVERY.

DISCLAIMER.

See ADMINISTRATION—AMENDMENT—BANKRUPT—COSTS—EVIDENCE—LUNACY—RECEIVER.

1. The plaintiff, who was entitled to tithes arising on the defendant's land, served the defendant with notice that he had, by a certain indenture and lease, demised those tithes for a term of years. The plaintiff afterwards filed the bill for an account of the same tithes. It appeared that the lessee disclaimed all interest in the tithes; and the lessee also put in a disclaimer in the cause.

Held,—that upon the disclaimers the Court might safely make a decree upon the evidence then before it, without directing an inquiry with reference to the alleged demise. *Mounsey v. Burnham*, i. 15

2. Where, in a suit for small tithes, by the vicar, against occupiers, the rector is a defendant and disclaims, the Court may use the disclaimer for the purpose of founding upon it a decree for the particular tithes demanded by the plaintiff in the suit, but not for the purpose of proving the right of the vicar to such tithes. *Salkeld v. Johnston*, i. 196

DISCOVERY.

See FORECLOSURE—INSPECTION—JURISDICTION—PLEA—PRIVILEGED COMMUNICATIONS—PRODUCTION OF DOCUMENTS—STAY OF PROCEEDINGS.

1. A party having deposited with his bankers an annuity deed, together with other instruments, as security for the balance of his banking account, cannot, by his answer to a bill seeking to have the annuity deed cancelled, and the other securities first applied in satisfaction of the banker's claim, protect himself from answering as to such other securities, by alleging that they are his own title-deeds, in which the plaintiff has no interest. *Duncombe v. Davis*, i. 182

2. Discovery:—Case in which a defendant must seek for information, which he may not himself possess. *Earl of Glessall v. Frazer*, ii. 99

3. In answer to a bill seeking to impeach a security and requiring the defendant to set forth what communications passed between his solicitor and agents in the transaction and the plaintiff; and what letters were written and received, and entries made on the subject by such solicitors—it is not sufficient for the defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had had or

DISCOVERY.

made: the defendant, if he has not personal knowledge of the facts, must at least show that he has endeavoured to acquire the information from his agents in the transaction in question. *Ib.*

4. The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information under the Marriage Act (4 Geo. 4, c. 76, s. 23), seeking the forfeiture of his interest in the wife's property, and a settlement of the same upon her and her issue. *Attorney-General v. Lucas*, ii. 566

5. Bill of discovery in aid of an ejectment by a plaintiff, claiming as heir-at-law against the devisees of a feme covert, alleging the absence of any power of appointment in such feme covert, or that it was never duly exercised by her. The only issue raised on the pleadings being on the validity of the appointment by the devise, the plaintiff was *held* not to be entitled to the production of the deeds, under which the defendants alleged that the power of appointment was given to their devisor, although it appeared, that, by such deeds, the estate was limited to her heirs and assigns, in default of appointment. *Bennett v. Glossop*, iii. 578

6. In a suit by a cestui que trust to set aside a purchase of the trust property, made thirty years before by the trustee, the trustee insisted on the knowledge of the transaction and long acquiescence therein by the cestui que trust; and, in his answer to a cross bill, the cestui que trust admitted that he had an opinion of counsel on his right, which he had taken many years before. The Court *held* the opinion to be a privileged communication, and refused to order its production. *Woods v. Woods*, iv. 83

7. In a suit seeking a partnership account, the defendant denied that any partnership had existed, but admitted that the names of both of the alleged partners had been used on the show-board, and otherwise in the business, as if they were partners, but with the view only of introducing the alleged partner into the business on the retirement of the defendant; and the defendant admitted the possession of books, accounts, and documents relating to the business and matters in question, but said that they related exclusively to his own title, and to matters connected with his own property and affairs in which the alleged partner had no interest, and that they did not relate to any business carried on in partnership, or in conjunction with the alleged partner:—*Held*, that the statement in the answer was not sufficient to exclude the title

of the plaintiff to the production of the documents mentioned in the schedule. *Harris v. Harris*, iv. 179

8. Upon motion by one of several defendants to dismiss the bill under the first article of the 114th Order of May, 1845, the order to dismiss will not be refused merely on the ground that other defendants have not answered, without showing sufficient cause for the delay in getting in the answer of such other defendants. *Stinton v. Taylor*, iv. 608

9. Demurrer to a bill of discovery, in aid of action on the case for negligence, allowed; it appearing by the bill that the cause of action had not arisen within six years before the suit. *Smith v. Fox*, vi. 386

10. Confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related. *Chant v. Brown*, vii. 79

11. Upon exceptions for insufficiency to the answer of a party who had been the attorney in the transactions impeached, and who refused discovery on the ground of privilege, the Court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after, for the question of sufficiency must be determined as of a time anterior to the exceptions. *Ib.*

12. Where the respective titles alleged by the plaintiff and defendant were antagonistic,—the plaintiff claiming the reversion in lands alleged to be in the possession of the defendant as lessee, and the defendant claiming to be entitled in fee to such lands, but admitting that he derived his title under a person alleged by the plaintiff to have been lessee only, and that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, corresponded with the parcels described in the demise to such alleged lessee: it was *held*, that the plaintiff was entitled to a discovery of such parcels, and to a production of so much of the purchase deed as described them. *Attorney-General v. Thompson*, viii. 106

13. A plaintiff is not entitled to discovery of documents, the right to the possession or inspection of which is not necessary to the proof, and is only consequential upon the existence of the title he claims, that title not being admitted,—but where the Court finds upon the answer, that, although the title of the plaintiff is not admitted, the question as to the existence of such title is a question to be tried,—the plaintiff is entitled to the discovery and production of particulars material to establish his case on such trial. *Ib.*

DISCOVERY.

14. Considerations of the limits of the right to discovery, in cases of adverse title, of the deeds and evidences in the possession of the defendant. *Ib.*

15. Distinction between cases in which discovery is sought of evidence relating to the items of an account, the right to which is disputed, and cases in which it relates to the fundamental question in dispute,—the right to the account. *S. C.*, viii. 115

16. The Court will in many cases compel a defendant to answer direct questions, the answer to which the Court may be less ready to allow a plaintiff to seek by examining the papers of his opponent. *S. C.* viii. 116

DISCRETION.

See TRUSTEE AND CESTUI QUE TRUST.

DISCRETION OF TRUSTEES.

See FINES ON RENEWAL—INVESTMENT.

DISMISSAL OF BILL.

See AMENDMENT—APPENDIX, vol. ix, p. xiv—COSTS—DECREE—GENERAL ORDERS, 1841, *August*, r. xxxii; 1842, *October*, r. xxiii—REPLICATION—STAY OF PROCEEDINGS.

1. The arrears of rent and amount of costs brought into Court by the plaintiff, in a suit to redeem a lease forfeited by non-payment of rent, must, if the bill is dismissed, be repaid to the plaintiff—*Semble*. *Bowser v. Colby*, i. 109

2. In a suit abated by the death of a sole plaintiff, the Court has no jurisdiction to order that his representatives shall revive the suit within a time to be limited by the Court, or that in default of their doing so, the bill shall be dismissed. *Lee v. Lee*, i. 617

3. One of two co-plaintiffs having become bankrupt, and the other appearing on the motion of the defendant to dismiss for want of prosecution, and declining to proceed with the cause, the bill was dismissed with costs. *Kilminster v. Pratt*, i. 631

4. Reasons for not declaring the dismissal of the bill to be without prejudice to another suit. *Gloucester (Mayor, &c.) v. Wood*, iii. 148

5. On the motion to dismiss the bill for want of prosecution under the 16th and 17th amended Orders of 1828, the Court will not enter into the merits of the cause, to determine whether the bill should be dismissed without costs; but will, with reference to the question whether the common order should be made, consider only the conduct of the parties in the cause in respect to its prosecution. *Stagg v. Knowles*, iii. 241

DISSENTERS.

6. Form of the notice of motion to dismiss a bill for want of prosecution, where the last step was a replication filed under the old practice. *Spencer v. Allen*, iv. 455

7. The 114th Order (s. 4) of May, 1845, as to the dismissal of bills for want of prosecution, applies to cases in which publication passed under the old practice, before the Orders of May, 1845, came into operation. *Robinson v. Parday*, iv. 483

8. The 114th Order of May, 1845, as to the dismissal of bills for want of prosecution, does not apply to a case where the subpoena to rejoin had been served, and there had been a commission to examine witnesses before the Orders of May, 1845, came into operation, but publication has not passed. *Prentice v. Phillips*, iv. 484

9. Order, on the application of the plaintiff, to dismiss his bill, with costs, against disclaiming defendants, without prejudice to any question how the costs should ultimately be borne. *Bailey v. Lambert*, v. 178

10. Notice of motion by one of two defendants to dismiss the bill for want of prosecution. The plaintiff thereupon filed a replication to the answer of that defendant; the other defendant had not appeared. On the motion being made, the plaintiff undertook to dismiss the bill against the other defendant, whereupon the Court refused the motion, but ordered the costs to be paid by the plaintiff. *Heanley v. Abraham*, v. 214

11. Pending a reference of title, ordered upon motion in a suit for specific performance, the defendant cannot, under the 114th Order of May, 1845, dismiss the bill for want of prosecution. *Collins v. Greaves*, v. 596

12. Where the same solicitor appeared for two defendants, one of whom had, and the other had not, filed his answer so long a time previously as to entitle him to move to dismiss the bill for want of prosecution, the Court refused such a motion by the former defendant, with costs. *Winthrop v. Murray*, vii. 150

DISPAUPERING.

It appearing on affidavits that a pauper defendant was entitled to property exceeding £20 in value, the Court, on motion, ordered him to be dispaupered. *Goldsmith v. Goldsmith*, v. 126

DISSENTERS.

See STATUTES, CONSTRUCTION OF, 7 & 8 Vict. c. 45—TRUSTEE AND CESTUI QUE TRUST.

DISSOLUTION.

DISSOLUTION.

See PARTNERSHIP.

DISTRIBUTION (PERIOD OF)

See CHILDREN—NEXT OF KIN.

DISTRINGAS.

See STATUTES, CONSTRUCTION OF.

DIVESTING OF INTEREST.

See CONTINGENT REMAINDER.

DIVIDEND.

See JOINT-STOCK COMPANY—STATUTES,
CONSTRUCTION OF, 4 & 5 Will. 4, c. 22.

DIVISION.

See CONVERSION.

DIVORCE.

See HUSBAND AND WIFE.

DOCTRINE AND DISCIPLINE.

See TRUSTEE AND CESTUI QUE TRUST.

DOCUMENT.

See EVIDENCE.

DOMICILE.

See ADMINISTRATION.

DOWER.

See ELECTION—IMPLICATION.

1. The testator devised all his real estate to a trustee upon trust for sale, with power to convey the same to purchasers without the concurrence of any person or persons beneficially claiming under his will; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust, to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life; with remainder, as to the whole of the trust funds, to the children of the testator's sister for their lives and the life of the survivor; remainder over. The widow of the testator was dowerable of part of the real estate:—*Held*, that the widow was entitled both to

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ELECTION.

her dower and to the benefit given to her by the will. *Ellis v. Lewis*, iii. 310

2. Where the devise of land is in trust for sale, the mode of applying the proceeds does not affect the question, whether the widow is entitled to her dower, or is put to her election. *S. C.* iii. 314

3. Bill for dower. The defendants in possession denied the title of the widow, alleging that her husband had not been seised of an estate of inheritance in the premises; that allegation being founded on information as to the time of his death, which was believed to be correct, but afterwards found to be erroneous. Decree for dower and arrears for six years before the filing of the bill, but without costs. *Bamford v. Bamford*, v. 203

4. *Semble*, If the defence to a bill for dower be groundless, or founded on facts which the defendants knew or with reasonable diligence might have known to be untrue, the decree would be with costs. *Id.*

DRAWER OF BILL.

See TRUSTEE AND CESTUI QUE TRUST.

EFFECT OF A GIVEN ACT.

See INJUNCTION.

EJECTMENT.

See COSTS—INJUNCTION—JURISDICTION.

ELDEST SON.

See LEGACY.

ELECTION.

See HERITABLE BOND.

The testator by his will devised and bequeathed all his real and personal estate to trustees, subject to debts, &c., upon trust by and out of the rents, issues, and profits thereof, to pay an annuity of £100 to his wife during her life or widowhood, and subject thereto, upon trust for his daughter for life, with remainder to her children, remainder to his brother. And the testator empowered his trustees, at their discretion, during the continuance of the trusts and notwithstanding the same, to continue and carry on all or any of the farms or other concerns in which he might be engaged at the time of his decease, and to restrict or increase any such concern, and to demise, mortgage, or sell all or any part of his real estate or chattels real:—*Held*, that the widow was not entitled both to the annuity given to her by the will and

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ELEGIT.

to her dower out of the real estate. *Lowes v. Lowes*, v. 501

ELEGIT.

See DEBTOR AND CREDITOR.

ENROLLING DECREE.

See APPENDIX, vol. x. p. xvi.

ENROLMENT.

See MORTGAGOR AND MORTGAGEE.

ENTRY ON LAND.

See STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18.

EQUAL SHARE.

See AGREEMENT.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITABLE ESTATE.

See LEGAL ESTATE.

EQUITABLE LIEN.

See FOREIGN ATTACHMENT.

EQUITABLE JURISDICTION.

See AWARD — COPYRIGHT — MISTAKE OF PRACTICE AT LAW — PARTNERSHIP — TRUSTEE AND CESTUI QUE TRUST.

1. The mere fact, that a party having a power by deed to revoke and make a new appointment of trust funds, has attempted to make such revocation and new appointment by will, owing to her having forgotten the restrictions of the power, and being at the time unable to procure the deeds,—is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees if the will were a good execution of the power. *Buckell v. Blenkhorn*, v. 131

2. A court of equity will declare and give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust. *Duncombe v. Levy*, v. 232

3. A bill to set aside, on the ground of fraudulent representation, an order in an action at law made by consent, staying the action and directing the payment of a certain sum of money by the defendant to the plaintiff, and which sum the plaintiff after-

EQUITABLE MORTGAGE.

wards accepted:—*Held*, to be demurrable, as it did not state that the plaintiff was ignorant of the alleged representation being fraudulent, not only at the time of the order, but at the time he received the money. *Dunn v. Cox*, xi. 61

4. It appearing that a second action had been brought by the plaintiff, and had been stayed by the Court of law, in consequence of the consent order made in the first action: and that the plaintiff had taken regular proceedings at law to set aside the order staying the second action, but that order had been sustained: this Court refused to aid a suit in equity brought by the plaintiff by giving him leave to amend, upon allowing a demurrer to his bill to set aside the consent order on the ground of such alleged fraud. *Id.*

5. Where a policy of life insurance had been effected, as part of a family arrangement, to secure to the wife and children of the insured a sum of money, and the husband, in breach of the condition of a bond which he had executed, omitted on one occasion to pay the premium on the policy, whereby the insurance dropped, but afterwards revived it; the Court,—under the circumstances, and being of opinion that the manner in which the object and intention of the insurance and the bond had been described to the husband in a correspondence on the subject had misled him, and that he was mistaken as to the consequences of the omission to pay the premium,—restrained an action on the bond in respect of such breach, upon the terms of the husband paying the costs. *Shearman v. McGregor*, xi. 106

6. The Court has no jurisdiction at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on or otherwise molesting the tenants. *Best v. Drake*, xi. 369

EQUITABLE MORTGAGE.

See DEBTOR AND CREDITOR—MORTGAGE — MORTGAGOR AND MORTGAGEE — PRIORITY OF INCUMBRANCES — RECEIVER.

An equitable mortgage by deposit of title-deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgage a purchaser for good consideration within the stat. 27 Eliz. c. 4, in respect of such balance; and, it being a term of the agreement that the mortgage to be executed should contain a power of sale, the Court, on a bill to set aside a prior voluntary conveyance by the mortgagor as fraudulent

EQUITABLE RELIEF.

and void, under the stat. 27 Eliz. c. 4, decreed, that, on default of payment, the mortgaged property should be sold. *Lister v. Turner*, v. 281.

EQUITABLE RELIEF.

See CHAMPERTY — JURISDICTION — LIFE ASSURANCE—PUBLIC POLICY.

EQUITABLE SEISIN.

See TENANCY BY THE CURTESY.

EQUITABLE SET-OFF.

See ACCOUNT.

1. A share of rent due from the occupying tenant of certain premises to the estate of a testatrix, who was one of several tenants in common of the same premises, allowed to be set off by her executors in a suit for a legacy bequeathed by the testatrix to the debtor; but not as against a legacy bequeathed by the testatrix to the wife of the debtor. *M^cMahon v. Burchell*, iii. 97

2. In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration: *Held*, that the executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations, 21 Jac. 1, c. 16. *Courtenay v. Williams*, iii. 539

3. Whether the executor would have had the same right of retainer if the suit had been for payment by himself personally, and not out of assets of the testator—*quære*. *Ib.*

4. A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes, C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration de bonis non of B., and sued A. on the bond:—*Held*, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. *Jones v. Mossop*, iii. 568

5. The obligor in a bond becoming surety for advances to the obligee, and being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off

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ESCHEAT.

the sum so paid against the amount due upon the bond. *Ib.*

6. The Court, on a bill for an account of transactions under a contract, and for an injunction, refused to restrain execution on a judgment for costs of an action at law, which the plaintiff had brought against the defendant, to recover monies alleged to be due under the same contract, and in which action there was a verdict for the defendant. *Fisher v. Baldwin*, xi. 352

7. Cross demands are not alone a sufficient foundation for equitable set off;—and whether equitable set-off is not confined to cases in which the equity of the bill impeaches the title to the legal demand—*quære*. *Ib.*

EQUITY.

See JURISDICTION.

1. Observations on the rule that the plaintiff seeking equity must do equity. *Hanson v. Keating*, iv. 4

2. The rule applies only to the one matter which is the subject of a given suit. *Id.* iv. 5

3. The fact, that the legal remedy which existed is obstructed or lost by lapse of time, is no ground for the interposition of a court of equity. *Ferrand v. Wilson*, iv. 384

4. The Court will neither allow the form of a transaction to protect a fraud, nor set aside a transaction otherwise valid, merely on the ground of form. *S. C.*, iv. 386

EQUITY RESERVED.

See SETTING DOWN CAUSE.

EQUITY OF REDEMPTION.

Distinction between an equity of redemption and a mere trust. *Viscount Downe v. Morris*, vi. 404

EQUITY FOR A SETTLEMENT.

See HUSBAND AND WIFE.

ERASURE IN PENCIL.

See REVOCATION.

ERROR IN ORDER OR DECREE.

See GENERAL ORDERS, 1828, April, r. XLV.

ESCHEAT.

1. The lord of a manor taking by escheat, on the death of a tenant without heirs, the fee-simple of lands holden of the manor, but subject to a demise by way of mort-

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ESCHEAT.

gage for a term of years created by the tenant, is entitled in equity, as against the mortgagee, to redeem the term. *Viscount Downe v. Morris*, iii. 394

2. If the lord, taking lands by escheat on the failure of heirs of his tenant, is liable, under the statute 3 & 4 Will. 4, c. 104, out of such lands to pay a mortgage debt of the tenant charged thereon, he is entitled to redeem the lands, and get in the securities which the creditor held for the debt. *Ib.*

ESTABLISHED CHURCH.

See TRUSTEE AND CESTUI QUE TRUST.

ESTABLISHED CHURCH OF SCOTLAND.

See TRUSTEE AND CESTUI QUE TRUST.

ESTATE IN FEE.

A testator by his will, dated in 1819, devised his freehold estate as follows:—"To my daughter Henrietta I bequeath the house I live in, being No. 11," &c.; "to my daughter Martha I bequeath my house No. 10," &c.; "but it is my will that the same be placed in trust, and that they shall only receive the rent during their life." "In case of Henrietta's death without leaving behind her more than one child, then the said house No. 11 shall revert to my son David, son John, and daughter Martha, in equal shares; but if she leaves more than one (be it one, two, or more), they shall all share alike the said property left to their mother; but suppose that none of them live to twenty-one years of age, the said property shall revert to David, John, and Martha, as before mentioned." Henrietta survived the testator, and died, leaving two children, of whom one lived to attain the age of twenty-one years, and the other died under that age:—*Held*, that the two children of Henrietta took an estate in fee simple in possession in the house No. 11. *Burke v. Annis*, xi. 232

ESTATE FOR LIFE.

See DEVISE.

ESTATE TAIL.

See CONSTRUCTION—CY PRES—DEVISE—REMOTENESS.

EVIDENCE.

See ACCOUNT—ADEMPTION—ADMISSION—ADMISSION AND DISCHARGE—AFFIDAVIT—AGREEMENT—APPENDIX, vol. 472

EVIDENCE.

ix, pp. xvi. lxx; vol. x, pp. xvii, xviii, xix, xx, xlv, xlvii, xlviii—APPOINTMENT—CREDITORS' SETTLEMENT—DEBTOR AND CREDITOR—DESCRIPTION—EXCEPTIONS—EXHIBIT—FRAUD—INJUNCTION—INQUIRY—JOINT STOCK COMPANY—JURISDICTION—LEGACY—MISTAKE—PARTNERSHIP—PRODUCTION OF DOCUMENTS—RECTIFYING DEED—SATISFACTION—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 7 & 8 Vict. c. 45—TITHES—TRAVERSING NOTE—VENDOR AND PURCHASER—WITNESS.

1. Where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume that the instrument was stamped, unless there be evidence showing that it was not stamped. *Hart v. Hart*, i. 1

2. To render secondary evidence admissible in proof of the contents of a lost document, it is sufficient to prove that every reasonable search for the document has been made, although every possible search may not appear to have been made. *Ib.*

3. The parties agreed to admit in the cause certain facts, in the same manner as if they had been proved by proper and legal evidence; and among others, that a certain exhibit was the notice, and a certain other exhibit was a true copy of the lease referred to in the notice:—*Held*, that the notice was not evidence of the lease so as to relieve the defendant from the necessity of calling the attesting witness. *Mounsey v. Burnham*, i. 15

4. That the admission as to the copy of the lease, substituted the copy for the original, but did not place the copy in a better situation than the original if it had been produced. *Ib.*

5. The admission of a will, in the separate answer of a married woman, who is the heiress-at-law of the testator, is not sufficient evidence to enable the Court to declare the will established. *Brown v. Hayward*, i. 433

6. Whether, in the case of a claim made adversely to a class of persons, the mode of proving that all the members of the class are parties, is necessarily by inquiry before the Master—*quære*. *Hawkins v. Hawkins*, i. 543

7. Instruments, neither admitted nor denied, may be proved *viva voce*, although the cause is heard upon bill and answer, without replication. *Rowland v. Sturgis*, ii. 520

8. A. contracted to purchase real estate, and died, having made his widow his universal devisee and legatee. The widow married B., who, in 1793, took a convey-

EVIDENCE.

ance of the premises contracted to be purchased by A., to himself and a trustee, reciting the contract by A.,—his will and death,—the marriage of his widow with B.; and that “thereupon B. became entitled to the beneficial interest in the purchase.” B., in 1817, sold the premises to C., and C. took a conveyance from B. and his trustee, reciting, that, by certain good and sufficient assurances in the law, the premises stood limited to B. and the trustee, but not reciting the deed of 1793. The widow died, leaving her heir-at-law an infant, who came of age in 1825, in the lifetime of B. The bill was brought by the heir-at-law in 1836, after the death of B., for a conveyance of the estate :—*Held*, that the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, and that the title of B. accrued by the marriage; that the Court would not presume, in favour of a purchaser, that B. had any other title than was so represented; that C. must be presumed to have been cognizant of, and to have taken the title of B. his vendor; that the equitable title of the heir-at-law of the widow was not affected by the lapse of time; and that the heir-at-law was entitled to the decree for a conveyance of the estate. *Nesom v. Clarkson*, ii. 163

9. Letters proved, but not particularly mentioned in the pleadings, are not therefore inadmissible; but if the production of such evidence would operate as a surprise on the other party, the Court will not give effect to it, without giving the party to be affected by it an opportunity of controverting it. *Malcolm v. Scott*, iii. 89

10. Circumstances under which the answer or disclaimer of one defendant may entitle the plaintiff to a decree in the cause as against another defendant, although the answer or disclaimer of one defendant is not evidence against the other. *Green v. Pledger*, iii. 165

11. Evidence on which the Court might decree the specific performance of an alleged agreement, according to one construction of a writing which was of doubtful meaning, where a conveyance, according to a different construction, had been executed by the vendor, and accepted by the purchaser. *Humphries v. Horne*, iii. 277

12. It being admitted or proved that advances had been made by the testator to the legatee :—*Held*, that cheques drawn by the testator on his bankers, in favour of, and paid by them to, the legatee, were evidence on the question of the amount of such advances; and that an admission of a debt to the testator, made by the legatee in his balance-sheet, and examination under his bankruptcy (though it did not charge

himself so as to take the debt out of the Statute of Limitations), was evidence of the character of the advances which had been made, on the question, whether such advances were loans or gifts. *Courtenay v. Williams*, iii. 539

13. *Senble*, an examined copy of a letter of attorney, inrolled in the office of record in Jamaica, is not admissible in evidence (without more); although an examined copy of a deed so inrolled is, by force of acts of the local legislature, admissible. *Faulkner v. Daniel*, iii. 221

14. Where the issue raised by the bill and answer was, whether the plaintiff had or had not signed a document under the representation and belief that it was an authority to another to receive the plaintiff's rents, when it was in fact a contract for the sale of his estate—evidence of the value of the estate cannot be regarded as showing that, if a purchase, it was a purchase from a distressed man at an under-value, but can only be regarded as bearing on the probability or improbability of the alleged sale. *Preston v. Wilson*, v. 194

15. Evidence received at the hearing of the cause, and entered in the decree, is not necessarily admissible as against all parties, on inquiries before the Master, under the decree. *Handford v. Handford*, v. 212

16. An order *ex parte* may be obtained by a defendant for leave to examine a co-defendant, saving just exceptions,—as well after the decree, as before the hearing; and the question of the competency of the witness will not be tried upon motion to discharge the order, but is open when his evidence is tendered. *Steed v. Oliver*, v. 492

17. *Quære*, whether an admission of the payment of legacies by the executor is, in any case, a conclusive admission of assets. *Savage v. Lane*, vi. 32

18. Payment by the executor of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the executor; but such payment may be explained as having been made by mistake, or for other reasons or causes; and in that case the usual account of assets may be directed at the suit of parties interested in the estate. *Postlethwaite v. Mounsey*, vi. 33, n.

19. Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff. *Wood v. Rowcliffe*, vi. 186

20. *Quære*, whether a deed vesting lands in trustees for a charitable use, not inrolled under the stat. 9 Geo. 2, c. 36, and therefore within that act “null and void,” is admissible in evidence, for the purpose of showing upon what trusts the lands are

EVIDENCE.

held, the party having the legal estate admitting that he is a trustee, and claiming no beneficial interest. *Attorney-General v. Ward*, vi. 482

21. An averment in the bill, that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of the trust, is sufficiently proved by the production of such letters of administration, notwithstanding they appear to have been granted on a date subsequent to the institution of the suit. *Bateman v. Margerison*, vi. 496

22. A deed, dated the 2nd of April, 1813, made between a mother and her two illegitimate children, recited, that, by a prior deed of the 28th of November, 1804, a trust fund had been appointed by the mother to one of such children, subject to a power of revocation, which was thereby expressed to be exercised, as to one moiety, in favour of the other child. The recited deed of the 28th of November, 1804, was not produced, and no evidence of it (beyond such recital) was given. The deed of the 2nd of April, 1813, was in another suit declared not to be a valid appointment, being in favour of persons whom the Court held not to be objects of the power reserved in the recited deed of the 28th of November, 1804; and in a suit by other persons claiming under legitimate children, and appointees of the same mother by an instrument later in date than that of April, 1813, the Court decreed the transfer of the fund to the parties representing such legitimate children, and refused to direct any inquiry as to the recited appointment of the 28th of November, 1804. *Bell v. Alexander*, vi. 543

23. *Quære*, as to the effect which would have been given to the recital of the deed of the 28th of November, 1804, if the title of the plaintiff in the last suit had been founded upon, or had been derived under or through, the deed of the 2nd of April, 1813, which recited that of the 28th of November, 1804. *Ib.*

24. On interlocutory applications, which are necessarily heard upon affidavits, the Court does not dispense with the rule, that, on disputed points, the best evidence in the power of the parties must be given; and, therefore, it is not sufficient for a party to state upon affidavit the purport and effect of a document which he has the means of producing. *Stamps v. The Birmingham, Wolverhampton, and Stour Valley Railway Company*, vii. 255

25. The evidence of a witness taken *de bene esse* before a cause is at issue, and not published before the hearing, may be published after the hearing, for the purpose of

being used on a question referred to the Master, if the witness cannot then be examined. *Forsyth v. Ellice*, vii. 290

26. Upon the motion by a defendant to suppress depositions supported by the affidavit of a witness, that the evidence which she gave before the commissioner was not truly represented in the depositions, and that she had mistaken the meaning of a technical expression used in the interrogatories, the Court refused to suppress the depositions, but gave the parties liberty to re-examine and cross-examine the witness *vis à voce* before the Master (the commission being issued after decree), upon the disputed parts of the depositions; and also gave the plaintiff liberty in the same manner to examine, and the defendant to cross-examine, the commissioner and his clerk. *Dobson v. Land*, vii. 296

27. A person served with a *subpœna duces tecum*, under the General Order XXIV. of May, 1845, to produce a document at the hearing of a cause, may, at such hearing, be called upon his subpoena, and asked whether he produces the document; and if he declines to produce it, why he so declines, or other like questions confined to the mere purpose of production. *Griffith v. Ricketts*; *Griffith v. Lunell*, vii. 301

28. Proof admitted on behalf of the plaintiff, of the execution of a deed by affidavit at the hearing, where the answer had not been replied to, but did not deny the execution. *Chalk v. Raine*, vii. 393

29. Where witnesses were examined during the abatement of a suit occasioned by the death of parties, the depositions of those who did not at the time of their examination know of the death of the parties which had caused the abatement, were received, and the depositions of those who did know such facts were suppressed. *Curtis v. Fulbrook*, viii. 29

30. Acts or communications of the parties after an agreement, may be evidence of facts existing at the time of the agreement material to its construction, but not to determine its meaning. *Monro v. Taylor*, viii. 56

31. In a suit for the administration of a trust, where the parties beneficially interested are before the Court, the trustees, although plaintiffs, ought not to enter into evidence as to facts relating to or showing the respective rights of the *cestui que trust*. *Girdlestone v. Creed*, viii. 208

32. Evidence of the number of persons constituting a partnership, for the purpose of proving that they are so numerous as to bring the case within the rule of the Court allowing a few partners to sue on behalf of themselves and others. *Clay v. Rufford*, viii. 286

EVIDENCE.

33. Evidence of timber having been left standing for ornament. *Marker v. Marker*, ix. 21

34. An affidavit, purporting to be sworn before a Master Extraordinary of the Court of Chancery in Ireland, is, under the stat. 14 & 15 Vict. c. 99, s. 10, admissible in evidence in a matter before this Court, without proof of the signature or official character of the person before whom it is stated to have been sworn. *In the matter of Mahon's Trust*, ix. 459

35. The stat. 14 & 15 Vict. c. 99, enabling parties to a cause to be examined as witnesses, renders unnecessary the common order under the old practice giving liberty to a party to examine another party, saving just exceptions. *Swann v. Wortley*, ix. 460

36. Case in which a party in a cause, heard upon bill and answer without replication, producing letters of administration to a deceased person,—the Court may admit them, to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character. *Wilkinson v. Fowkes*, ix. 592

37. Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit. *Ib.*

EXAMINATION.

See ADMISSION—ADMISSION AND DISCHARGE—CO-DEFENDANT—DEFENDANT—EVIDENCE—WITNESS.

EXAMINATION DE BENE ESSE.

See APPENDIX, vol. ix, p. xxii—EVIDENCE.

On the application for a commission for the examination de bene esse of a witness above seventy years of age (such witness being the plaintiff in the cause and a defendant in a cross cause, whose time for answering had expired, and whose answer had not been put in, and being also the party who applied for the commission for the purpose of being examined in support of his own case, under the stat. 14 & 15 Vict. c. 99), the Court refused to impose it as a condition in making the order, that the answer should be filed. *Forbes v. Forbes*, ix. 461

EXAMINATION IN BANKRUPTCY.

See EVIDENCE.

EXAMINATION OF WITNESSES ORALLY AT THE HEARING.

See APPENDIX, vol. ix, p. xxii.

EXCEPTIONS.

EXAMINER.

See APPENDIX, vol. ix, p. lxxv.

EXCEPTIONS.

See ANSWER—APPENDIX, vol. x, pp. xx, 1
—CONTEMPT—COSTS—DISCOVERY—
INJUNCTION—NEXT OF KIN—OBJEC-
TIONS TO DRAFT REPORT—PARTNER-
SHIP—PRO INTERESSE SUO.

1. Where an answer is reported sufficient, and the bill is amended, the plaintiff cannot again sustain exceptions on the old matters. If the further answer is referred on new exceptions relating to the old matters, the defendant may object that the answer in such respects must be deemed sufficient; and it is not necessary that he should move to discharge the order of reference. *Duncombe v. Davis*, i. 184

2. There is no exception to the foregoing rule, where the amendments consist of particular charges and interrogatories, which were included in a general charge in the original bill, or of a prayer for specific relief included in the general prayer; but,

3. Whether there is an exception to the rule, where a new case is made by the amended bill—*quære*. *Ib.*

4. The Court will, in a proper case, entertain a special application to refer an answer to the Master to consider its sufficiency, without regard to the fact, that, by amending, the plaintiff has, in form, admitted it to be sufficient. *Ib.*

5. In a case which is brought on in the form of exceptions, but in which the substantial order would be the same however the exceptions may be disposed of, the Court may dispose of the case, without making any order upon the exceptions. *Hall v. Laver*, i. 571

6. Where, on a reference as to title in a suit against a purchaser for specific performance, the Master reports in favour of the title, but the Court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed without overruling the exceptions taken by the defendant to the report. *Robinson v. Milner*, i. 578, n.

7. An order to set down for argument exceptions to the Master's report of insufficiency, obtained after service of an order for leave to amend, and for the defendant to answer the amendments and exceptions together, is irregular. *Earl of Glengall v. Bland*, i. 624

8. Exceptions to the Master's report ought to follow in form as well as in substance the objections carried in before the Master. *Ballard v. White*, ii. 158

9. Upwards of thirty separate objections

EXCEPTIONS.

were taken to the draft report, in respect of the same number of items allowed in an account; one exception, including all the objections, was taken to the report, for that the Master ought to have disallowed the same items, or some or one of them:—*Held*, that this was informal, for, the exceptant requiring the judgment of the Court on every item, the exceptions should have been in the same form as the objections, and thereby have called for such judgment: that this exception must be allowed, if it should be found that any item ought to have been disallowed: but that, notwithstanding the informality, the Court might, if it thought fit, hear the exception upon all the items, and make a special declaration as to any or all which had been improperly allowed. *Ib.*

10. Leave to amend the bill, without prejudice to exceptions to the answer which had been over-ruled. *Woods v. Woods.*

iii. 411

11. Report of the Master that he had not thought fit to allow certain charges or payments without the direction of the Court:—*Held*, to leave the propriety of the allowance open, and not to render exceptions necessary in order to raise the question. *Johanson v. Child.*

iv. 90

12. After exceptions for insufficiency overruled, under the 38th Order, and an answer put in to an amended bill, motion for leave to except to the answer, notwithstanding the former order on the exceptions, refused. *Kaye v. Wall.*

iv. 128

13. The Master in his report stated, that he had admitted certain evidence, and that thereupon he found certain facts. A party objecting to the admission of the evidence, and to the conclusion thereupon, cannot open that objection as appearing on the face of the report, without having taken exceptions. *East v. East.*

v. 347

EXCHANGE.

See STATUTES, CONSTRUCTION OF, 1 & 2 Geo. 4, c. 92.

EXCLUDING CLAUSE.

See WILL.

EXECUTION.

See ADMINISTRATION SUIT—JURISDICTION—PARTNERSHIP.

EXECUTOR.

See ADMINISTRATION SUIT—ADMISSION—ADMISSION AND DISCHARGE—COSTS—DEBTOR AND CREDITOR—EVIDENCE—PARTNERSHIP—PAYMENT INTO COURT

EXECUTOR.

—POWER—STATUTES. CONSTRUCTION OF. 3 & 4 WILL. 4. c. 104—TRUSTEE AND CESTUI QUE TRUST.

1. An executor, in a suit for the arrears of an annuity under a will, disputing the title of the plaintiff to the annuity as a question of law, but admitting assets sufficient to pay funeral and testamentary expenses and legacies, may be decreed to pay the costs of the suit in addition to the arrears, and is not entitled to a decree for an account of the assets prior to any decree being made for costs. *Rock v. Callen.*

vi. 501

2. An executor having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum of money equal in amount to the debt: and the creditor accepted the personal security of the executor for the amount, and released his debt against the estate:—*Held*, that the executor having, by such substitution of his own security for that of the estate, discharged the debt, as against the estate, should not be treated as a mere purchaser of the debt of the creditor, and as such entitled only to stand in the place of the creditor; but that the executor was entitled to be allowed, in his own discharge, the amount of the debt as a debt of the testator preferred and paid. *Hepworth v. Heslop.*

vi. 561

3. On a question in the administration of assets, whether a bond given by a testator to his son for alleged arrears of salary was voluntary or for valuable consideration, the Court, not relying on the admission of the testator, or the examination of the son and executor, in a case where the estate was insolvent, directed an issue on the question, whether the testator, at the time of executing the bond, was indebted to the obligee to the amount thereby secured. *Ib.*

4. One of two executors may sue the other executor for an account and payment of monies owing by such other executor to the testator at the time of his death; and to such a suit the persons beneficially interested in the estate are not necessary parties. *Peake v. Ledger.*

viii. 313

5. By an assignment, by one of several executors, of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will (but not stating the fact that a third executor had also subsequently proved), and reciting that the executors had assented to the bequest to the assignor, it was witnessed that the assignor, in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned,

EXECUTOR.

sold and assigned the premises to the purchaser. The assignor, in his character of executor, was, at the time of the assignment, indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf the estate of the testatrix, to set aside the assignment, and recover the title deeds:—*Held*, that the assignment by the executor to the purchaser was effectual; and that, whether there had or had not been an assent to the bequest by the other executors, the Court would not disturb the sale. *Cole v. Miles*,
x. 179

6. Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them—*Quere. Ib.*

7. A testatrix bequeathed a leasehold to trustees and executors, in trust for sale, and gave one of such executors a beneficial interest for his life in one-fourth part of the estate. The latter executor, being at the time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to secure a private debt which he owed to a creditor, and deposited the title deeds with the creditor:—*Held*, on a bill by his co-executors, to recover the title deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the Court decreed the title deeds to be delivered up, with a declaration that they belonged to the three trustees. *Cole v. Muddle*,
x. 186

EXECUTOR DE SON TORT.

1. The widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected, and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration:—*Held*, that A. having received monies which he knew to be part of the estate of the testator, and not having accounted for such monies to the legal personal representative of the testator, A. was liable to be sued as executor de son tort. *Sharland v. Mildon*,
v. 469

2. That the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow and A., in reference to the testator's estate, were the acts of wrong doers, and

EXTRA-PAROCIALITY.

the law does not recognise the relation of principal and agent as existing amongst wrong doers. *Ib.*

3. That A. was liable as executor de son tort to account to a party interested in the testator's estate, in a suit for that purpose, without any charge of collusion between such executor de son tort and the legal personal representative. *Ib.*

EXECUTOR & ADMINISTRATOR.

See ACCOUNT—ADMINISTRATION—COSTS—DEBT—EQUITABLE SET-OFF—LEGACY—PARTIES—POWER—RETAINER—SOLICITOR.

1. *Semble*, a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate duty is calculated. *Jones v. Howells*,
ii. 342

2. The administrator under a limited administration, granted by the proper Ecclesiastical Court, represents the estate of the deceased to the extent of the authority conferred by the letters of administration; but if the administration granted be more limited than the purposes of the suit require, and it is in the power of the plaintiff to obtain a more general administration, the Court may require him to do so. *Faulkner v. Daniel*,
iii. 207

EXERCISE OF POWER.

See BREACH OF TRUST.

EXHIBITS.

See BILL AND ANSWER—PRODUCTION OF DOCUMENTS.

1. A deed proved by the attesting witness *vivâ voce* at the hearing, is well proved for all purposes in the cause, unless it is impeached. *Bowser v. Colby*,
i. 109

2. The 43rd Order of August, 1841, allowing exhibits to be proved by affidavit, instead of *vivâ voce* at the hearing, does not dispense with the practice of obtaining the order of leave to prove the exhibit at the hearing, but that order may be obtained after the affidavit has been made. *Clare v. Wood*,
i. 314

EX PARTE PROCEEDINGS.

See PRO CONFESSO.

EXTRA-PAROCIALITY.

In a suit for tithes, a district consisting of 307 acres of land, within the ambit of, and surrounded by, the parish:—*Held*, after the trial of an issue at law, to be extra-

EXTRA-PAROCIALITY.

parochial, and the bill dismissed with costs.
Clayton v. Meadows, ii. 26

FACTOR.

See AGENT—PRINCIPAL AND AGENT.

FAILURE OF ISSUE.

See CONSTRUCTION.

1. Estates settled on the husband for his life, with remainder to his sons successively in tail, remainder to the husband in fee, were devised by the husband, in case he should die without having any issue by his wife, to his wife for her life, remainder to his brother for his life, with remainder in trust for sale, with a direction to pay £4000 out of the proceeds, rents, and profits, to the eldest daughter of the brother, to be a vested interest on her attaining twenty-one or day of marriage:—*Held*, that, upon the true construction of the will, the ulterior limitation depended on the failure of issue at the death of the testator, and not on the general failure of issue; and that the daughter was entitled to the £4000. *In the Matter of Rye's Settlement*, x. 106

2. Where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. *Ib*

3. The fixing of the time of the death of living persons as the period of disposition, considered as inconsistent with the notion that the legacy was to take effect only on general failure of issue. *Ib*

FAITH AND CONFIDENCE.

See INJUNCTION.

1. Relief, on the principle of correcting abuses of confidence, given against the liability in the maker of a promissory note, taken from a poor patient on the occasion of a change of his position in life, by his medical attendant without any account having been rendered, and for an amount beyond what was due for his attendance on the most extravagant scale of charges. *Billage v. Southee*, ix. 534.

2. If the right to a benefit taken by a person in a confidential situation be questioned in equity, and it is sought to be sustained as an exercise of liberality, it must be shown that it was the intention of the party from whom the benefit emanated to be liberal; but in-

FAMILY CONTRACT.

tention imports knowledge, and liberality imports the absence of influence; and the onus of establishing a gift in such circumstances rests with the party who has received it. *Ib*

3. The bill sought to restrain the defendant from proceeding to recover the amount of a promissory note for £325, on two grounds: first, that the plaintiff had signed it in the belief that it was for £25 only; and secondly, that it was given by the plaintiff, the patient, to his medical attendant, on the occasion of an accession of fortune to the family of the patient, without any account delivered, and for an amount more than would be due for medical attendance on the most extravagant scale of charges; and the Court, on proof of the circumstances constituting the second ground of relief—*Held*, that the plaintiff was entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the plaintiff, although the case of the plaintiff as to the first ground of relief sought by his bill was wholly disproved. *Ib*

4. The plaintiff in equity having an equitable as well as a legal defence to the action on the note, and having filed his bill, is not bound to go into evidence at the trial at law to establish his legal defence, but may rely on his case in equity. *Ib*

FALSE RECITAL OF INCUMBRANCE.

See PRIORITY OF INCUMBRANCERS.

FAMILY.

See ALIENATION—DEVISE.

1. The testator bequeathed several legacies, and, among others, to S. W. £14,000, "and to the latter gentleman's family £6,000." S. W. had six children, all living at the date of the testamentary instrument and at the death of the testator, and no other issue:—*Held*, that such six children were, as joint tenants, exclusively entitled to the legacy of £6,000. *Wood v. Wood*, iii. 65

2. A bequest to the family of G., held not to be void for uncertainty; but construed to be a gift to the children of G. (an uncle of the testator, known to and on terms of intimacy with him), as joint tenants, and not to include the parents or their grand-children. *Gregory v. Smith*, ix. 708

FAMILY ARRANGEMENT.

See RECTIFYING DEED.

FAMILY CONTRACT.

1. A deed conveying the property of an

FAMILY CONTRACT.

intestate, upon trusts, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister and heiress-at-law, her husband, and her illegitimate son, and which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:—*Held*, not to be voluntary within the statute of Elizabeth; but supported and enforced against the heiress-at-law and her husband, and also against subsequent purchasers from them for valuable consideration with notice of the trust deed. *Heap v. Tonge*, ix. 90

2. Under the agreement and trust deed, other children of the sister and heiress-at-law, both legitimate and illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate; and it was held, that the deed was not voluntary as to such other parties, but that they were within the consideration of the family contract. *Ib.*

3. Power of the parties to a family arrangement, stipulating for the interests of other members of the family, afterwards to modify the terms of the arrangement. *S. C.*, ix. 103.

FEE SIMPLE.

See DEVISE.

FELON.

See ASSIGNMENT—ATTORNEY-GENERAL—STOCK.

FELONY.

Whether the party who has been injured by a felonious taking of his property, and is prosecuting the imputed felon, may not sustain a bill or proceeding in equity against the latter, to preserve in the meantime the property, the abstraction of which is the subject of the criminal charge—*quære. In the matter of the Marquis of Hertford*, i. 584

FERRY.

See PENALTIES.

FINE.

See COPYHOLD—LESSOR AND LESSEE.

FINES ON RENEWAL.

See RENEWAL OF LEASE.

1. On a devise of successive interests in 479

FINES ON RENEWAL.

leases for lives or years, where the testator directs that the leases are from time to time to be renewed, without more, the fines and expense of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities. *Jones v. Jones*, v. 440

2. There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years. *Ib.*

3. If the testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the Court will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines. *Ib.*

4. Whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, and in cases where such interests are taken under settlements by deed—*quære. Ib.*

5. Whether trustees, having power to raise the fines out of the rents and profits, or by mortgage or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the Court—*quære. Ib.*

6. Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession; and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine. *S. C.*, v. 465

7. Where leases, which the testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment

FINES ON RENEWAL.

out of funds belonging to the testator's estate (not charged with such renewal), and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution of which he might be liable to make for the benefit he should derive from the renewal, the Master found, and the Court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new cestui que vie, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled. *Hudleston v. Whelpdale*, ix. 775

8. The Court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own. *Ib.*

9. But, *semble*, the mode of providing the security adopted by the report is erroneous in principle: for the object of the Court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life. *Ib.*

10. Although it may be, that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is, that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given. *Ib.*

11. The Court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals before the occasion for giving such security has arisen. *Ib.*

FORECLOSURE.

FORECLOSURE.

See APPENDIX, vol. ix, p. xxvi; vol. x, pp. 1, li—COSTS—DECREE—HUSBAND AND WIFE—MORTGAGE—MORTGAGOR AND MORTGAGEE—PRIORITY OF INCUMBRANCERS—SET-OFF.

1. Where, after the second report, and day of payment fixed, in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mortgagor within one month of the interest and costs found due by the last report, notwithstanding there was doubt whether the value of the security was ample. *Geldard v. Hornby*, i. 251

2. The mortgagee of a real estate made a further advance, and took, as security for the same, a further charge upon the mortgaged premises; the covenant of the mortgagor for payment, and an assignment of a policy of assurance on the life of the mortgagor, upon trust to receive the monies to become payable on the policy, and thereout first to pay the expenses of the trust, then to apply the residue towards payment of the mortgage debt, or so much thereof as should remain due, and subject thereto upon trust for the mortgagor. Upon the bill of the mortgagee praying a sale of the policy, and payment by the mortgagor of so much of the debt as the proceeds of the sale should be insufficient to pay, or in default, that the mortgagor might be foreclosed:—*Held*, that the mortgagee was entitled only to the usual decree for payment or foreclosure of the real estate, and not to a decree for the sale of the policy; but that he was entitled to retain the policy upon the terms of the trust, notwithstanding the foreclosure of the real estate. *Dyson v. Morris*, i. 413

3. A conveyance of an estate to A. in trust, that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon non-payment, after notice, is not a mortgage entitling A. to bring his bill for foreclosure. *Sampson v. Pattison*, i. 533

4. On a motion by a defendant for an immediate decree in a foreclosure suit, under the stat. 7 Geo. 2, or under the jurisdiction of the Court, independent of the statute, the order may be made without answer; and if the bill suggests that the defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to that fact upon affidavit. *Piggin v. Cheetham*, ii. 80

5. A party to a suit in which a decree of

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foreclosure has been made in the absence of another party interested in the estate, whose interest was not disclosed on the pleadings, is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure. *Bromitt v. Moor*, ix. 374

6. A party to a foreclosure suit, whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate by devise or otherwise, from another person who was not a party to the foreclosure, may bring his bill of redemption. *Ib.*

7. Relief will not be given in such a case, on a claim for redemption, stating only that the plaintiff is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the suit for foreclosure, or the grounds on which the plaintiff seeks to set it aside. *Ib.*

8. Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the plaintiff was found by the Master, and the subsequent incumbrancer was brought before the Court by the supplemental claim. *Robinson v. Turner*, ix. 488

FOREIGN ATTACHMENT.

The plaintiffs advanced several sums of money to S., M., and W., on the security of shipments coming to them as return remittances from their correspondents in Hayti, which shipments they directed the Haytian house to consign to the plaintiffs. The Haytian house was informed of the contracts, and promised the plaintiffs to make the remittances accordingly. In June, 1842, a cargo of goods was prepared by the Haytian house as return remittances; and they directed the plaintiffs to insure a part of the cargo on the account of S., and informed W. that a part of the cargo was intended for him, which W. communicated to the plaintiffs. The resident partner in the Haytian house died in June, 1842, after the cargo had been shipped, but before it was consigned; and his administratrix consigned the cargo to B., in London, under whose orders it was sold, and by whom the proceeds were received in December, 1842. S. & Co., creditors of the Haytian house, on the 29th of August, 1842, attached by foreign attachment, according to the custom of London, the goods of the Haytian house in B.'s hands. By a letter, dated the 7th of September, 1842, the surviving partner in the Haytian house directed B. to hold the cargo for S., M., and W., in certain parts. On a bill and motion to restrain the proceeding of S. & Co. against B., in the Lord Mayor's Court 481

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—*Held*, that the right of the plaintiffs, if any, was an equitable and not a legal right; that the plaintiffs were entitled to the aid of the Court in the trial of the right; and that the proceedings in the Lord Mayor's Court should be restrained by injunction. *Cotesworth v. Stevens*, iv. 185

FOREIGN COURT.

See JURISDICTION.

FOREIGN FUNDS.

See INVESTMENT.

FOREIGN LAW.

See MORTGAGOR AND MORTGAGEE.

FOREIGNERS.

See PATENT.

If, in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of regulating such rights. *Caldwell v. Vanvliessen*, ix. 425

FORFEITURE.

See ALIENATION — DISCOVERY — EQUITABLE JURISDICTION — PAYMENT INTO COURT — PIRACY — STATUTES, CONSTRUCTION OF.

1. A court of equity will relieve a lessee from a forfeiture by non-payment of rent, where there is a proviso that in that case the lease shall be void, as well as where there is a mere power of re-entry. *Bowser v. Colby*, i. 109

2. Equitable agreements, charging the property comprised in a lease, but not accompanied with a change of possession or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignment—*semble*. *Ib.*

3. A court of equity, when asked by a lessee to grant him relief against forfeiture, will consider the conduct of the lessee in dealing with the property, whether that conduct does or does not involve a breach of covenant. *Ib.*

FORMA PAUPERIS.

See APPENDIX, vol. x, p. lii—SERVICE.

Where the order for leave to sue in forma pauperis has not been served, and is not rendered inoperative by any subsequent

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step in the cause, it is in the discretion of the Court, either to give costs to the pauper, or to order him to pay them, as the case may be. *Church v. Marsh*, ii. 654

FOUNDER.

See JURISDICTION.

FRANKALMOIGNE.

See JURISDICTION.

FRAUD.

See AGENT—APPOINTMENT—DEBTOR AND CREDITOR—EQUITABLE JURISDICTION—FAITH AND CONFIDENCE—INFANT—JOINT STOCK COMPANY—LAND TAX REDEMPTION—MARITAL RIGHT—PARTNERSHIP—PLEADING.

1. To what extent the equity of the husband to set aside a settlement, as a fraud on his marital right, is taken away, by the absence of any other settlement in favour of the wife, or the poverty of the husband, or the reasonable nature or meritorious object of the impeached settlement, or the ignorance of the husband of the existence of the settled property—*quare*. *Taylor v. Pugh*, i. 608

2. It is not necessary, in order to establish his title to this equity, that the husband should prove actual fraud or deception, for deception will be inferred, if, after the commencement of the treaty of marriage, the wife should have attempted to dispose of her property, without the knowledge or concurrence of her intended husband. *Ib.*

3. The application of the rule of the Court to dismiss a bill in which the title to relief is founded upon allegations of fraud, if such fraud be not proved, depends not upon the use or omission in the bill of the word "fraud," but upon the fact, whether the charges upon which the relief is sought are in their nature such as this Court regards as constituting fraud. *M^cCalmont v. Rankin*, viii. 15

4. The defendant became acquainted with the fact, that, under the will of a relation of the plaintiff, an estate vested in trustees was settled (after a subsisting life estate, and upon the failure of issue of the tenant for life, who had then no issue), to the plaintiff for life, with remainder to his issue in tail, with remainders over, and an ultimate remainder to the plaintiff's brother (then deceased), and his heirs and assigns; the defendant having communicated to the plaintiff (who was then supposed to be, and was in fact, the heir-at-law of his brother), the existence of such a

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will, in a long correspondence produced an impression on the mind of the plaintiff, contrary to the true facts, that the plaintiff's interests under the will were precarious; that they were endangered by the conduct of the trustees and tenant for life, and could not be established without difficulty, delay, and litigation; and the defendant obtained a conveyance of a moiety of the estate from the plaintiff, the defendant indemnifying plaintiff against the costs of recovering the property. The Court set aside the conveyance; and *held*, that it was not an objection to this relief, that the plaintiff had, throughout, the means, equally with the defendant, of knowing what his rights were, and of obtaining competent advice respecting them. *Reynell v. Sprye*, viii. 222

5. Where a conveyance of a moiety of an estate was made by A. to B., upon a representation first made to A. by B., that such moiety was to be the remuneration of the lawyer for recovering the estate, and upon a subsequent representation, that such moiety had been made over to him, B.; the circumstance, that such representations as to the remuneration for professional services, and as to the transfer to B., were untrue, was *held* to be a ground for setting aside the conveyance. *Ib.*

6. Where property is in the hands of trustees for the parties entitled to it, and there is no adverse claim after the death of the parties in possession,—a communication to one of the cestui que trust in remainder of his interest in the property, is not a consideration upon which a conveyance of a portion of the property can be sustained as the sale of a secret; for, in such a case, the disclosure is a nullity. *Ib.*

7. The defendant having taken a conveyance in fee from the plaintiff of an estate, which the plaintiff would not be able so to convey except as heir-at-law of his deceased brother, and a suit having been brought by the plaintiff against the defendant to set aside the conveyance on the ground of fraud, and continued by the devisee of the plaintiff after his decease, the absence of proof that the plaintiff was such heir-at-law, and therefore that his devisee had any interest in the estate, was *held* not to be an objection to a suit, which it was open to the defendant to raise. *Ib.*

8. A conveyance of one moiety of an estate being set aside, a contract for the sale of the other moiety to the same party, based on the previous conveyance of the first moiety, cannot be supported. *Ib.*

9. Circumstances in which insurance companies preparing and issuing policies not in conformity with the agreement upon which the assurance was accepted, may be

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liable in equity on the ground of fraud.
Collett v. Morrison, ix. 176

10. A purchase obtained by fraud would be, in effect, no purchase, and could not acquire any validity by the confirming statutes. *Beaden v. King*, ix. 523

FRAUDULENT CONVEYANCE.

See PRO INTERESSE SUO—STATUTES, CONSTRUCTION OF, 13 *Eliz.* c. 5.

FREE CHURCH.

See TRUSTEE AND CESTUI QUE TRUST.

FREE SCHOOL.

The term "free school" is flexible in its meaning, and must be construed according to the context and usage. It has no reference to the instruction given, but to the terms on which it is given. *Att.-Gen. v. Bishop of Worcester*, 358

FREIGHT.

See SHIP.

FUND IN COURT.

See COSTS.

FURNITURE.

See CONSTRUCTION.

FURTHER ASSURANCE.

See VOLUNTARY ASSIGNMENT.

FURTHER DIRECTIONS.

See PAYMENT INTO COURT.

FUTURE CARGO.

See ASSIGNMENT.

FUTURE COVERTURE.

See HUSBAND AND WIFE.

GENERAL ASSEMBLY.

See TRUSTEE AND CESTUI QUE TRUST.

GENERAL LEGACY.

See LEGACY.

GENERAL ORDERS.

GENERAL ORDERS.

1661. (LORD CLARENDON'S ORDER)—See ATTACHMENT.

1666, JULY. (LORD CLARENDON'S ORDERS)—See OUTLAWRY.

1748, APRIL 27.—See JURAT.

1796, APRIL 23.

The Masters are not themselves actors in applying the General Order of the 23rd of April, 1796, against defaulting receivers; and the Court will not open accounts against such receivers for the purpose of depriving them of their poundage and the costs of passing their accounts, when the parties beneficially interested have not raised any objection to the allowance of such poundage and costs before the Master. *Ward v. Swift*, viii. 139

1828, APRIL, r. IV.—See TIME.

———— r. XIII.—See AMENDMENT.

———— r. XIII. (AMENDED) — See ANSWER.

———— r. XV.—See REPLICATION.

———— r. XVI.—See TIME.

———— r. XVI. (AMENDED). — See DISMISSAL OF BILL.

———— r. XVII.—See COMMISSION.

———— r. XVII. (AMENDED) — See DISMISSAL OF BILL.

———— r. XIX.—See TIME.

———— r. XXVIII.—See COSTS.

———— r. XLV.

The accidental omission of an usual term or direction in a decree or order is an error which may be corrected by petition, under the 45th Order of April, 1828; but not so the omission of any term or direction which would only have been introduced under the express judgment of the Court. *Bird v. Heath*, vi. 236

———— r. LXXIV. — See IMMATERIALITY.

1831, r. XVI.—See REPLICATION.

GENERAL ORDERS.

1833. DECEMBER. *r.* XIX.—See COSTS.

———— *r.* XXVI.—See TIME.

1839. MAY 9. *r.* V.—See AFFIDAVIT—PRELIMINARY INQUIRIES.

1839. MAY 10. *rr.* I et seq.—See DECREE.

1841, AUGUST.—See JURISDICTION.

———— *r.* VII.—See APPEARANCE.

———— *r.* VIII.—See APPEARANCE
ATTACHMENT — BILL
OF REVIVOR — PRO
CONFESSIO.

———— *r.* XL.—See DECREE.

———— *r.* XII.—See ATTACHMENT
—DECREE—WRIT OF
ASSISTANCE.

———— *r.* XIII.—See WRIT OF
ASSISTANCE.

———— *r.* XV.—See ATTACHMENT.

———— *r.* XVI.—See ANSWER.

———— *r.* XVII.—See ANSWER—
INTERROGATORIES.

———— *r.* XVIII.—See INTERRO-
GATORIES.

———— *r.* XIX.—See INTERROGA-
TORIES.

———— *r.* XXI.—See ANSWER —
TRAVERSING NOTE.

———— *r.* XXIII.—See APPEARANCE
—BILL—COPY OF BILL
— DEMURRER — IN-
FANT — PLEADING —
TRUSTEE AND CESTUI
QUE TRUST.

———— *r.* XXIV.—See BILL—COPY
OF BILL—INFANT—IN-
TERROGATORIES.

———— *r.* XXIX.—See COPY OF
BILL.

———— *r.* XXX.—See PARTIES—
TRUSTEE AND CESTUI
QUE TRUST.

1. Under the 30th Order of August, 1841, the trustees of real estate by devise, having the powers mentioned in the order, represent the persons beneficially interested

in such real estate, (so as to make it unnecessary that persons having charges thereon should be parties), not only in suits by persons claiming adversely against the estate, but also in suits by some of the persons beneficially interested, and where the conduct of the trustees is in question. *Osborne v. Foreham*, ii. 656

2. In a suit since the 30th Order of August, 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties, where they are devisees in trust, having the powers specified in the order. *Ward v. Bassett*, v. 179

3. Where the suit involves the administration of the estate, and distribution of the residue, the devisees in trust do not, under the 30th Order of August, 1841, sufficiently represent the persons beneficially interested in the estate. *Jones v. How*, vii. 270

———— *r.* XXXII.—See ADMINISTRATION SUIT—PARTIES
—TRUSTEE AND CESTUI
QUE TRUST.

If a suit be instituted against defendants jointly and severally liable within the meaning of the 32nd Order of August, 1841, the plaintiff cannot, after the cause stands for hearing, dismiss his bill, or waive the relief, as to some or one of such defendants, and prosecute the cause against the others only under that Order; and, therefore, where one of such defendants became bankrupt during the progress of the cause—at the hearing, the assignees in the bankruptcy were held to be necessary parties. *Fussell v. Eltwin*, vii. 29

———— *r.* XXXVII.—See DEMUR-
RER.

The 37th General Order of August, 1841, although it removes the technical objection, that an answer to matters covered by a demurrer overrules the demurrer, yet does not enable a defendant, who has answered an original bill, to demur to an amended bill, upon any cause of demurrer to which the original bill was open. *Attorney-General v. Cooper*, viii. 166
[Observations on *Wyllie v. Ellice*, 6 Hare, 505]. *Ib.*

———— *r.* XXXVIII.—See AN-
SWER — EXCEPTIONS
— IMMATERIALITY —
PARTNERSHIP.

———— *r.* XXXIX.—See ANSWER
—PARTIES.

GENERAL ORDERS.

1841, AUGUST, *r. XL.*—See PARTIES.

To a bill to enforce payment of a legacy charged on real and personal estate, the heir-at-law of the survivor of the trustees appointed by the testator, and the personal representative of the testator, should properly be parties; but the defendants not having, by plea or answer, objected that such heir or personal representative were necessary parties, the Court would, under the 40th Order of August, 1841, in the circumstances of the case, make a decree saving their rights. *Faulkner v. Daniel*, iii. 199

———— *r. XLIII.*—See EXHIBIT.

———— *r. XLIV.*

Since the General Order XLIV. of August, 1841, which directs that the decree against a defendant, who makes default at the hearing, shall be absolute in the first instance, without giving him a day to show cause, the practice has been, notwithstanding the default of the defendant, to hear the cause, and make such a decree as the plaintiff upon the pleadings and evidence is entitled to, and not as theretofore to allow the plaintiff to take such a decree as he can abide by. *Hakewell v. Webber*, ix. 541

———— *r. XLVI.* — See ADMINISTRATION SUIT—INTEREST.

———— *r. XLVII.*—See COSTS.

———— *r. XLVIII.*—See MASTER'S REPORT.

———— *r. XLIX.*—See PLEADING.

1842, APRIL 11, *r. I.*—See ABSCONDING—BILL OF REVIVOR—PRO CONFESSO.

1842, OCTOBER 26, *r. XVI.*—See vol. ii, p. 533, n. (b).

———— *r. XVIII.*—See SOLICITOR.

———— *r. XX.*—See ADDRESS FOR SERVICE — SERVICE — WRIT.

———— *r. XXI.*—See SERVICE.

according to the 23rd General Order of October, 1842, of filing a replication, plea, demurrer, &c., on the opposite party on the same day that the replication, plea, demurrer, &c., is filed, will, in ordinary cases, be corrected, not by rendering the replication, plea, demurrer, &c., inoperative, or taking it off the file for irregularity, but by extending the time allowed to the opposite party for taking the next step in the cause, so as to give him the benefit of the time which he would otherwise lose by the delay in the service. *Wright v. Angle*, vi. 107

———— *r. XXVIII.*—See LUNATIC.

1845, MAY.

Where the time allowed for taking a certain step in a cause expired before the General Orders of May, 1845, came into operation, those orders do not revive it. *Medhurst v. Allison*, iv. 480

———— *r. XIII.*—See DEMURRER.

———— *r. XIV.*, Art. 4.—See REPLICATION.

———— *r. XVI.*—See AMENDMENT.

———— *r. XVI.*, Art. 41.—See REPLICATION.

———— *r. XXIV.*—See AMENDMENT.

———— *r. XXXIII.*, Arts. 1 & 2.

Form of the order for service abroad, under the 1st and 2nd articles of the 33rd General Order of May, 1845. *Whitmore v. Ryan*, iv. 612

———— *r. XXXIII.*—See JURISDICTION.

———— *r. XLIII.*—See ANSWER.

———— *r. XLVI.*—See DEMURRER.

———— *r. LVI.* — See TRAVERSING NOTE.

———— *r. LXV.*—See AMENDMENT.

———— *r. LXVI.*—See DISMISSAL OF BILL.

———— *r. LXXVI.* — See STATUTES, CONSTRUCTION OF, 1 Will.

FILE

to children of secondary to the children of the school—the children of their neighbourhood must be provided a passage. A

3. The maintenance of a school is a matter for the local authority, but the maintenance of children and youth is upon themselves and earnings, free of charge, to show that it was required for maintenance in the actual emergency. A. L. I. 38

4. Evidence of witness the Court suggested that a school was a grammar school within the jurisdiction of the Court under the Statute of Westminster. A.

5. Objections between schools raised for the maintenance of children and youth in a certain town, it stated the witnesses might therefore also be interested by referring to the place for their education, and schools entered for the education of boys were in the town in which the school is situated. I. L. I. 38

6. If in the one side, there may be evidence, there are in the other great advantages resulting from the maintenance of children of the upper and lower classes in the same school. I. L. I. 38

7. The question is, not whether a competent master of a grammar school can be provided for a given income, but by what means the services of a superior master can be secured, and there is no rule that the Court will exclude donors in all cases where the income of the charity is sufficient for the maintenance of the master. A.

GRANDCHILDREN.
S. CHILDREN.

GRANDSON.

The fact that, wherever a limitation occurred in the will in favour of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons:—*Held*, to indicate that the sons were intended to take by particular description, and the grandsons as a class. *East v. Tynforth*.
ix. 713

**GREAT BRITAIN—LEGACY FOR
THE BENEFIT AND ADVAN-
TAGE OF.**

§ CHARITABLE TRUST OR USE.

GUARANTEE.

See **PRINCIPAL AND SURETY.**

GUARDIAN.

See INFANT—LUNATIC—RECEIVER.
Testamentary guardian of an infant

GUARDIAN.

trustee, who was residing out of the jurisdiction, appointed guardian ad litem, without either the appearance of the infant in Court, or a commission. *Shuttleworth v. Shuttleworth*, ii. 147

GUARDIAN AD LITEM.

See APPENDIX, vol. ix, pp. xxvi, lxxvi; vol. x, pp. xxiv, lii, lxvii—INFANT.

A guardian ad litem to a defendant shown by affidavit to be a lunatic, but not so found by inquisition, appointed without a commission, *Piddock v. Smith*, iv. 395

GUIANA.

See MORTGAGOR AND MORTGAGEE.

HABEAS CORPUS.

See MOTION.

HALF BLOOD.

See NEPHEW.

HEARING.

See AMENDMENT—CREDITORS' SUIT—COSTS—EVIDENCE—INJUNCTION—INQUIRY—WITNESS.

If, at the hearing of the cause, it be stated and admitted, that a defendant on the record has become bankrupt since the institution of the suit, the plaintiff is not (in ordinary cases) at liberty to disregard the bankruptcy, and take a decree against the defendant, as if no bankruptcy had occurred; but the cause will be ordered to stand over, that the assignees may be made parties. *Fussell v. Elwin*, vii. 29

HEIR AT LAW.

See ALIEN—AMENDMENT—CHARGE—CONVERSION—DEBTOR AND CREDITOR—DEVISE—DISCOVERY—EVIDENCE—PRELIMINARY INQUIRIES—STATUTES, CONSTRUCTION OF, 4 & 5 Will. 4, c. 22—VOID DEVISE—VOLUNTARY DEED.

1. The heir-at-law of the vendor of the real estate is a necessary party to a suit by the administrator of the vendor against the purchaser for specific performance of the contract. *Roberts v. Marchant*, i. 547

2. An heir-at-law, by his answer admitting the execution of the will under which the plaintiff claims, but alleging that it was revoked by a subsequent will, whereby the estate in question was devised to the defendant, which subsequent will was unintentionally destroyed, and submitting either that the subsequent will ought to be established, or that there was an intestacy,

HEIRLOOMS.

—is not entitled to an issue devisavit vel non. *Whittaker v. Newman*, ii. 229

3. The defendant, in such a case, not giving any evidence of the alleged revocation beyond the mere statement, which was read by the plaintiff from the answer, is not entitled to any inquiry respecting it, and the Court will declare the will established. *Tb.*

4. The testatrix devised and bequeathed her real and personal estate in trust, as to the real estate, for sale, as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale as a fund of personal and not real estate, for which purpose such proceeds, or any part thereof, should not, in any event, lapse or result for the benefit of her heir-at-law; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should, by any codicil to that her will, direct or appoint. The testatrix made no codicil:—*Held*, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. *Fitch v. Weber*, vi. 145

5. In a creditors' suit, seeking the application of real estate in the payment of debts, both the heir-at-law and devisees of the debtor being parties, and the will not being admitted by the heir,—the Court would neither dismiss the bill against the heir, nor direct an issue devisavit vel non at his request,—the right of the creditors being paramount. *Spickernell v. Hotham*, ix. 73

6. "Inherit" construed in the sense of succession by descent. *East v. Twyford*, ix. 729

HEIR AT LAW AND RESIDUARY LEGATEE.

See HERITABLE BOND.

HEIR OF ENTAIL.

See PARTIES.

HEIRLOOMS.

1. Bequest of plate, jewels, and other chattels by the Earl of Abergavenny to his son, Viscount Nevill, and his heirs, Earls of Abergavenny, "to be held as heirlooms," with a direction to the testator's executors to make an inventory of all such chattels and effects; and a subsequent bequest by a codicil, declaring, that, in addition to the articles and things he had in his will made heirlooms, certain other articles should be considered and taken to be heirlooms, and bequeathing the same to his

HUSBAND AND WIFE.

woman "for her whole and sole use during her life, free from the control of any future husband, and not to be sold or mortgaged, and, after her decease, to her heir or heirs; and provided her child or children should die before her, then that she may, at her decease, leave them to whom she will for the remainder of the term." The husband and wife demised the premises to a purchaser, and the purchaser demised them to another. The wife then filed her bill to have the under-lease set aside:—*Held*, that the gift was to the separate use of the wife, as well during the present as during a future coverture; that the under-lessees from the purchaser must be treated as having notice of the wife's interest; and that the under-lease to the purchaser should be set aside, but without costs. *Steedman v. Poole*, vi. 193.

7. To a bill by a husband, claiming, in his marital right, against his wife and the trustees of their marriage settlement, part of the furniture of a house which was let furnished at an entire rent, the whole of which had, from the time of the marriage, been received by the wife for her separate use, and seeking to have the rent apportioned, the answer of the wife set up a parol agreement by the husband, made before the marriage, that the wife should possess the furniture in question for her separate use, although it was not included in the marriage settlement:—*Held*, that the Plaintiff had no equity to sustain a suit for an account of an apportioned part of the past rents. *Simmons v. Simmons*, vi. 352.

8. That the Plaintiff had no equity to sustain a suit for the apportionment of the rent of the house and furniture, in respect of his alleged interest in the latter, unless it appeared that he was by some reason precluded from bringing his action at law to recover the furniture which he claimed; and that the Plaintiff not having shown that he had no remedy at law, the bill must be dismissed. *Ib.*

9. Although a parol agreement, before marriage, that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under the dominion of the trustees, and treated as separate property, the agreement may be made effectual. *Ib.*

10. Although a bequest of stock for a married woman, for her separate use for her life, and, after her decease, for her appointees by deed or will, directs that any appointment by deed shall not come into operation until after her death, the married woman is not thereby restrained

from anticipation, or prevented from appointing the fund by an irrevocable deed. *Alexander v. Young*, vi. 393.

11. By a post-nuptial settlement, a sum of money, the property of the wife, was vested in trustees, upon trust to pay the income as the wife should from time to time appoint, not by way of anticipation; and in default of appointment, to the wife for her separate use, independent of G., her husband; and from and after her death, to G., the husband, for life; and from and after the death of the survivor, to the children of the marriage, as therein mentioned; and if there should be no children, and the wife should survive G., the husband, the whole trust property to be paid to her; and if G., the husband, should survive the wife, then at his death, as the wife should appoint, or, if no appointment, to her next of kin:—*Held*, that, there being no definite term during which the trustees were directed to pay the income as the wife should appoint, or for her separate use, and the direction to pay to herself being made with reference only to the marital rights of G., the then existing husband, and there being no protection, by the express words of the settlement, afforded against a future marriage of the wife, the provision for the separate use and the clause against anticipation had no force after the death of G., the husband, and during a second coverture of the wife; and that, therefore, the second husband had power to assign the interest of the wife in the trust property. *In re The Act 10 & 11 Vict. c. 96, and In re Gaffee's Settlement*, vii. 101.

12. In the joint answer of a husband and wife to a creditors' bill for payment out of an estate of which the wife was administratrix, the wife alone set up the Statute of Limitations as a defence to the suit:—*Held*, that the interest of the wife was not so merged in the coverture, that the Court would disregard her separate defence; and that the statute was, for the protection of the estate, sufficiently pleaded by the wife alone. *Beeching v. Morphew*, viii. 129.

13. The obligation imposed upon a husband, suing for the property of his wife, of doing equity by making a settlement, is not enforced by the Court upon the bill being filed, nor upon the decree being made, where the interest is in reversion (for the Court only deals with the interest in possession); but the obligation is enforced when the property comes to be distributed. *Osborn v. Morgan*, ix. 432.

14. On the principle that marriage is a gift of the personal property of the wife to the husband, there is no distinction be-

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tween property to which the wife is entitled in equity and property to which she is entitled at law. *Ib.*

15. The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of equity exercise over property falling under their dominion. *Ib.*

16. The right to a settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it. *Ib.*

17. Origin of the wife's equity for a settlement. *S. C.* ix. 434

18. The Court cannot take the consent of the wife to part with her reversionary interest. *Ib.*

19. The consent of the wife taken in a Court of equity to part with her interest in property about to be distributed, is not analogous to a fine at law with respect to real estate. *S. C.* ix. 435

20. A Court of equity will not lend itself as an instrument to enable a husband to acquire a right in his wife's property, which he has no means of acquiring at law. *Ib.*

21. If a wife thinks proper to keep up an establishment against the wishes of the husband, what is supplied for the establishment will be a consideration for payments out of her estate on that account. *Hughes v. Wells,* ix. 749

22. That, the proceeds of the settled funds having been placed to the wife's account at her bankers, and applied principally to the current expenses of the establishment of her husband and herself by the order and direction of the wife, the husband being the agent in their application—as to monies so applied, there was a defective appointment, which ought to be aided by the Court. *Ib.*

23. If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why (the wife having been constituted a feme sole by the settlement) her assets, including the trust funds which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances. *Ib.*

24. The rights of married women may be barred, and their estates affected, by active participation in breaches of trust, and if—their powers having been exercised by will—the trust funds become their assets, they must be liable for those breaches of trust, *semble*. But the fact of a married woman having permitted her husband to receive the trust funds does not preclude a right to relief by her or her appointee, for that

would be to defeat the purpose for which the trust was created—the protection of the wife against the husband. *Ib.*

25. A married woman, whose husband did not maintain her, *held* not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life. *Tidd v. Lister, Basil v. Lister,* x. 140

26. As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby purchasers would be involved in inquiries into the relations between husband and wife, their property, and means of maintenance. *Ib.*

27. Distinction between the cases in which a wife takes an absolute interest in her property, and those in which she takes a life-interest only; and between cases of an assignment by the husband of the wife's property to his general assignee on his bankruptcy or insolvency, and of an assignment to a particular assignee for value. *Ib.*

28. Monies coming to the hands of the receiver in a cause in which the husband and wife are parties, might be considered as not reduced into possession by the husband; but where the husband has created incumbrances on the property in which he became interested in right of his wife, and the Court has ordered the monies to be applied in favour of the incumbrancers, the effect is to divest the title, and reduce into possession the monies which were the subject of the order. *Ib.*

29. Settlement of the whole of the share of a married woman in the estate of an intestate upon the married woman and her children, with a provision, that, if there should be no children, and the husband should survive the wife, the assignees of the husband should take the fund, the case being one in which the husband, being an uncertificated bankrupt, had married an infant, and afterwards abandoned her. *Gent v. Harris,* x. 338

30. By a marriage settlement, an estate was conveyed to trustees, upon trust to pay the rents and profits to the intended wife during her life, for her separate use, but the same to be applied for the benefit of herself, and also for the support, maintenance, and education of the children of the marriage; and, after the decease of the wife, to the use of the husband, with remainder to his first and other sons in tail; and it was provided, that, in case a separ-

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tion should take place, by reason of any disagreement or otherwise, between the husband and wife after the marriage, the rents and profits should, from the time of such separation, during the joint lives of the husband and wife, be paid to the husband for his own use, but without prejudice to the right of the wife to receive them for the remainder of her life, in case she should survive her husband. Upon a claim, filed by the husband against the trustees and the wife, to enforce the proviso:—*Held*, that the separation referred to, if it received a judicial construction, could not be construed as applying to an accidental and temporary separation arising from the state of health of the parties, or from the necessity or convenience of residing in different places with their mutual concurrence, nor to a separation arising from the absence of the husband on business; but that it must be construed to mean, either a separation by contract between the husband and wife, or the result of proceedings in a Court of competent jurisdiction. *Cartwright v. Cartwright*, x. 630

31. That, supposing the proviso to be valid, a Court of equity would not give effect to it in favour of the husband, where the separation had taken place under the sentence of a Court of competent jurisdiction, founded upon the misconduct of the husband, entitling the wife to a divorce *à mensâ et thoro*. *Ib.*

32. But, whether the proviso for the event of a separation was not wholly void, or whether it could be supported by construing the settlement as making a provision for the wife and children so long as the wife should reside in the house of the husband, and to go over upon her ceasing to do so—*quære*. *Ib.*

33. The interest of a married woman in the proceeds of real estate, devised by the will under which she took such interest, upon trust for sale, held to pass by her deed executed and acknowledged according to the provisions of the stat. 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of conveyance, whether such interest be in possession or reversion, and whether the sale of the real estate be or be not made. *Briggs v. Chamberlain*, xi. 69

34. Where a testator had directed, that, in the event of the marriage of his daughter, a certain portion of his property should be secured to her and the issue of her marriage, by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court, on an application to which the surviving trustee was a party, approved of a power in the settlement made on the

IMPLICATION.

marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband. *Charlton v. Rendall*, xi. 296

IDENTITY OF INTEREST.

See JOINT-STOCK COMPANY.

IGNORANCE.

A plaintiff may be entitled to relief from a contract or conveyance, on the ground of ignorance and mistake, although the defendant with whom he dealt, and against whom relief is sought, was also in ignorance and under mistake—the contract or conveyance not being made upon the principle of compromising doubtful rights. *Reynell v. Sprye*, viii. 222

ILLEGAL CONTRACT.

See PUBLIC POLICY.

ILLEGITIMATE CHILDREN.

See CHILDREN.

IMMATERIALITY.

Under the 74th Order of April, 1828, the Master does not, on the ground of immateriality, overrule exceptions for insufficiency, unless it is clear that the question cannot be material. If the materiality be doubtful, the case is not within the Order. *Tipping v. Clarke*, ii. 383

IMPERTINENCE.

See PLEADING.

IMPLICATION.

See ESTATE IN FEE—LEGACY.

1. A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife. *Adams v. Adams*, i. 537

2. A marriage settlement declared the trusts of a sum of stock to be, that, during the joint lives of the husband and wife, the dividends should be paid to the wife for her separate use; and if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely;

IMPLICATION.

and if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband :—*Held*, that the wife took, by implication, a life interest in the trust-fund. *Allin v. Crawshay*, ix. 382

IMPROVEMENTS.

See ACQUIESCENCE—CONTRACT—MISTAKE—TENANT FOR LIFE.

1. To a bill which alleged (amongst other things) that the plaintiffs, believing themselves to be entitled under a devise to a dwelling-house and shop, entered into an agreement for a lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and rebuilding the premises,—that the defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced,—that he knew also that the improvements were being made, and that the plaintiffs and their tenant were acting under a mistake, and, nevertheless, permitted the works to be carried on without any objection during their progress,—and praying that the defendant might be decreed to confirm the lease, and in the meantime be restrained from evicting the tenant ;—a demurrer for want of equity was allowed. *Master or Keeper, Fellows and Scholars of Clare Hall v. Harding*, vi. 273

2. *Held*, also, that in such a case the principle is the same whether the owner and the party making the expenditure by mistake are strangers, or tenants in common of the property. *Ib.*

3. That the owner having once and recently given notice of his claim to the property, was not, in order to exclude any equity in respect of the expenditure on the ground of mistake by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on. *Ib.*

4. That, in order to exclude such equity, it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title ; nor, if the claim which he made exceeded what he was entitled to, was the party in possession justified in disregarding it, or supposing it to be unfounded. *Ib.*

INCLOSURE.

See COMMON LANDS.

INFANT.

INCLOSURE ACT.

See ACT OF PARLIAMENT.

INCOME OF RESIDUARY ESTATE.

See TENANT FOR LIFE AND REMAINDERMAN.

INCOMPETENCY.

See WITNESS.

INCUMBRANCE.

See ANNUITY—PRIORITY OF CHARGE—TRUSTEE AND CESTUI QUE TRUST.

INCUMBRANCER.

See NOTICE—PRIORITY.

INDEFINITE ACTS.

See INJUNCTION.

INDEMNITY.

See INTERPLEADER—MORTGAGOR AND MORTGAGEE—SPECIFIC PERFORMANCE.

INDEPENDENTS.

See TRUSTEE AND CESTUI QUE TRUST.

INDORSEMENT ON BILL OR CLAIM.

See APPENDIX, vol. ix, p. xxvii.

INFANCY.

See HUSBAND AND WIFE.

INFANT.

See ACQUIESCENCE—APPENDIX, vol. x, p. xxiv—COPYHOLD—GUARDIAN—JURISDICTION—MARRIAGE—MORTGAGOR AND MORTGAGEE—NEXT FRIEND—SOLICITOR—TRUSTEE AND CESTUI QUE TRUST.

1. The motion for leave to enter a memorandum of service of a copy of the bill, under the 24th Order of August, 1841, needs not to be supported by an affidavit, showing that the defendant is not an infant. *Welch v. Welch*, i. 293

2. An infant plaintiff coming of age during the progress of the cause, and disapproving of the proceedings, cannot appear in the proceedings by counsel other than those who appear for the plaintiffs generally : he can only complain of or repudiate the proceedings by making them the subject of a special application. *Bal-lard v. White*, ii. 158

INFANT.

3. Payment by a trustee to an infant cestui que trust, nineteen years of age, on the false representation by herself and her parents that she had attained the age of twenty-one, *held* to be a discharge to the trustee for the sum so paid; but a release executed by the infant to the trustee of all demands in respect of the trust, *held* not to be a bar to a suit by the same cestui que trust against the trustee, although such suit was not brought until seven years after the cestui que trust had attained twenty-one. *Overton v. Banister*, iii. 503

4. The circumstance that infants are residing in two different parts of the kingdom, is not a sufficient ground for dispensing with the practice for assigning a guardian ad litem by commission or upon their appearance. *Mower v. Orr*, vi. 417

5. A party entering upon, and taking the rents and profits of, an infant's estate, may be sued at law as a trespasser, or in equity as the bailiff, guardian, and trustee of the infant, at the election of the plaintiff. *Wyllie v. Ellice*, vi. 505.

6. Where it appears that several persons entered on and held the estate of an infant, one of such persons cannot be sued by the infant in equity as his bailiff, guardian, or trustee, for an account of the rents and profits of the estate, without making parties to the suit the others of such persons. *Ib.*

7. Articles made upon the marriage of a minor, covenanting to settle her real estate on attaining her majority, for the benefit of herself and her husband, and the issue of her marriage, preclude the husband, during the coverture, from doing or concurring in any act inconsistent with the articles, but are not binding upon the wife. *Pymm v. Insall*, vii. 193

INFORMATION.

The Court disapproves of charity informations got up by public meetings, and supported by public subscriptions. *Attorney-General v. Bishop of Worcester*, ix. 369

INGROSSING CLERK.

See SUPPRESSING DEPOSITIONS.

INHERITANCE.

See ALIEN.

INJUNCTION.

See ABATEMENT—ACQUIESCENCE—ADMINISTRATION SUIT—AFFIDAVIT—AGREEMENT—BILL OF EXCHANGE—CONTEMPT—CONTRACT—COPYHOLD—DEMURRER
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INJUNCTION.

—EQUITABLE JURISDICTION—EQUITABLE SET-OFF—FOREIGN ATTACHMENT—HUSBAND AND WIFE—IMPROVEMENTS—INTERPLEADER—INSOLVENT DEBTOR—JOINT-STOCK COMPANY—JURISDICTION—MISTAKE OF PRACTICE AT LAW—NUISANCE—OUTSTANDING TERM—PARTIES—PATENT—PENALTIES—PLEADING—PRINCIPAL AND SURETY—RAILWAY COMPANY—RECEIVER—SHIP—SPECIFIC CHATTELS—STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18—TRUST—TRUSTEE AND CESTUI QUE TRUST—UNDUE INFLUENCE—VENDOR AND PURCHASER—WASTE.

1. It is not the practice of the Court to look into the answer to an injunction bill, for the purpose of determining whether the answer is sufficient, without exceptions having been previously taken thereto, notwithstanding the answer may be filed so near the day of trial, that it is probable the trial will be had before the proceedings can be stayed by the result of a reference in the usual course. If the answer were a mere pretence and evasive, it might be otherwise. *Scotson v. Gaury*, i. 99

2. If, in such a case, the answer is excepted to for insufficiency, the Court will look into the exceptions and the answer, *instantly*, without referring them. *Ib.*

3. Where the Master has certified the defendant's answer to be insufficient, the Court, notwithstanding the plaintiff has been dilatory in his application for the injunction, will, on the eve of the trial, look into the answer and the exceptions, *instantly*, to determine if the answer is evasive. *Ib.*

4. The goods of the defendant, and the lease of certain premises belonging to him, were taken in execution under a *fi. fa.* and sold: the plaintiff became the purchaser of the term, and was put into possession of the premises by the sheriff, but no assignment of the term was otherwise made. The defendant afterwards brought ejectment and recovered. The plaintiff filed his bill to restrain proceedings in the ejectment, and moved for the injunction upon the answer, by which the defendant, admitting the plaintiff's case, insisted upon alleged irregularities in the execution of the *fi. fa.*, which, it was argued, rendered the proceedings in that execution invalid at law. The Court granted the injunction, with liberty to the plaintiff to take such proceedings at law as he might be advised to perfect his title. *Jones v. Hughes*, i. 383

5. Equity confessed on the answer. *Bentinck v. Willink*, ii. 1

6. The Court will not, on the application

INJUNCTION.

of a mortgagee out of possession, restrain the mortgagor from proceeding to fell timber growing upon the mortgaged estate, unless the security is insufficient. *King v. Smith*, ii. 239

7. What proportion the value of the mortgaged property should bear to the mortgaged debt, in order to be deemed a sufficient security within the rule under which the Court acts in restraining waste by the mortgagor—*quære*. *Ib.*

8. The pendency of proceedings before the Judge at chambers to settle the pleas to the action is no ground for varying the form of the order for extending the common injunction to stay trial. *Woodall v. White*, iii. 411

9. That, where the opinion of the Court was not clearly for or against the plaintiff, it would be governed by the balance of inconvenience, on either side, in granting or refusing the injunction; and, where the damage to the plaintiff was shown to be small in amount, the Court would not pre-judge the legal question by granting the injunction, but would require an account to be kept pending the trial at law. *Cory v. Yarmouth and Norwich Railway*, iii. 593

10. Form of the common injunction restraining proceedings at law touching the matters in question in the cause. *Lund v. Blanshard*, iii. 31

11. Whether the Court will grant an injunction, restraining a party from taking a ship to any other than a certain port, thereby, in effect, compelling him to proceed to such port—*quære*. *Lidgett v. Williams*, iv. 465

12. After an injunction had been granted, restraining a defendant from permitting a certain injurious effect to be produced by a given cause (but not otherwise restraining any definite act), the apprehended injury took place, but the defendants denied, to the best of their belief, that it arose from the alleged cause; and the Court, in such circumstances, refused to treat the defendants as contumacious, until it should have been conclusively determined by a verdict at law, that the injury complained of was produced by the cause assigned. *Dawson v. Paver*, v. 424

13. The verdict of a jury on the trial of one issue had found that the forbidden cause would produce the effect; but inasmuch as a new trial of the issue had been directed, the Court would not treat the verdict of the jury, on the first trial, as sufficient evidence to connect the cause with the effect, for the purpose of proceeding as upon a breach of the injunction. *Ib.*

14. In a suit for an injunction against the use by the defendants of a certain name

and mark upon their goods, the defendants admitted the use of the name and mark, but said that it was their true name, and that they were entitled so to use it: the plaintiffs, without moving for the injunction, went into evidence in equity. At the hearing of the cause, the Court being of opinion that the evidence did not establish the plaintiffs' right to the injunction, but that it showed the defendants to have used the name and mark in question on their goods, in a manner which might lead purchasers to understand, falsely, that the goods were manufactured by the plaintiffs,—gave the defendants the option either of having the bill dismissed against them, without costs, or of having the right tried at law. *Rodgers v. Nowell*, vi. 325

15. The bill being retained for a year, with liberty to the plaintiffs to bring an action at law, the action was brought, and the plaintiffs recovered a verdict. The Court then granted the injunction, and ordered the defendant to pay the costs at law and in equity, except the costs of the evidence in equity. *Ib.*

16. Upon a bill for an injunction to restrain the defendants from using a certain mark, alleged to be fraudulently used by them on goods, in order untruly to denote that such goods were manufactured by the plaintiffs, the Court at the hearing retained the bill, and gave the plaintiffs liberty to bring an action, but refused to direct any admissions to be made by the defendants on the trial of such action. *S. C.*, vi. 337

17. On a bill for an injunction to protect the plaintiffs' coal-mines from injury by the water flowing to them from the defendants' colliery, the Court on motion granted an injunction restraining the defendants from working their coal-mines in any places which might injure or endanger the plaintiffs' mines, until answer or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence, and the cause was brought to a hearing, when the Court refused, until the plaintiffs had established their right at law, to make the injunction perpetual, but retained the bill for a year, giving the plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the meantime. *The Duke of Beaufort v. Morris*, vi. 340

18. *Quære*, whether the present practice of the Court is, in any case, upon motion (not *ex parte*) to grant an injunction for the purpose of protecting a legal right which is not admitted, without providing by the order for the trial of the right in a court of law. *S. C.*, vi. 349

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19. The circumstance that the defendants submit to an injunction granted upon an interlocutory application, and that none of the acts complained of were subsequently repeated, is no objection to the injunction being made perpetual at the hearing of the cause. *S. C.*, vi. 350

20. Where an injunction is applied for upon a distinct ground, which fails, it will not in general be granted upon another ground which has not been put forward, but which, it appears, might have been put forward in the circumstances of the case. *Castelli v. Cook*, vii. 89

21. An injunction granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a defendant, who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. *Morison v. Moat*, ix. 241

22. A plaintiff not having the privileges of a patentee, may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he may, notwithstanding, have a good title to protection against the particular defendant. *Ib.*

23. The case of a secret acquired by a breach of faith or confidence, but communicated to a purchaser for value, without notice of any obligation affecting it, distinguished from that of a party whose claim of right to use the secret is that of a volunteer. *Ib.*

24. The Court, in interfering in such cases upon the ground of faith or confidence, fastens upon the conscience of the party, and enforces the obligation against him, as it enforces, against a party to whom a benefit is given, an obligation to perform a promise upon the faith of which the benefit has been conferred—*Semble*. *Ib.*

25. The injunction restrained the sale of medicine by the defendant under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the use of the name that the defendant was availing himself of the breach of faith and contract. Whether, apart from that ground of interference, the Court would have restrained the use of the name before the plaintiff's right had been established at law—*quære*. *Ib.*

26. On a bill to restrain the exercise of a legal right, it is the duty of the plaintiff to satisfy the Court that there are substantial grounds for doubting the existence of the legal right. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, ix. 441

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"INJURIOUSLY AFFECTED."

27. Although the Court has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the Court would interfere by interlocutory injunction to restrain the use of the building after it had been erected. *The Warden, &c., of Dover Harbour v. The South Eastern Railway Company*, ix. 493

28. The Court refused to grant an injunction at the suit of Flavel, to restrain Harrison from making and selling a stove by the name of "Flavel's" Patent Kitchener, on the ground, first, that Flavel had falsely assumed to describe the article as being patented; and, secondly, that he had known of the use of the name by Harrison four months before he applied for the injunction. But the Court, not deciding the question whether Flavel had or had not a legal remedy, retained the bill, giving him liberty to bring an action. *Flavel v. Harrison*, x. 467

29. The plaintiffs, who represented the original patentees of an article, the patent for the manufacture of which had expired, continued to use labels on their goods printed from the original blocks belonging to the patentees, on which labels the goods were described as patented. The defendants adopted and issued labels closely resembling those of the plaintiffs. And under such circumstances, although the description of the plaintiffs' goods on their labels as being patented had ceased to be strictly true, the Court granted an injunction, restraining the defendants from using labels bearing an inscription appearing to designate the goods contained therein as being manufactured by the plaintiffs. *Edelsten v. Vick*, xi. 78

30. Cases (as of waste) in which delay in applying for an injunction may not be deemed to preclude the parties aggrieved from obtaining that relief upon an interlocutory application. *Attorney-General v. Eastlake*, xi. 206

INJUNCTION TO STAY PROCEEDINGS AT LAW.

See APPENDIX, vol. ix, pp. xxix, lxxvi.

"INJURIOUSLY AFFECTED."

See STATUTES, CONSTRUCTION OF, 8 Vict. c. 20, s. 6.

INQUIRY.

INQUIRY.

See APPENDIX, vol. x, p. lii—EVIDENCE—PLEADING—PRIORITY.

1. Circumstances under which the Court will, before making any other decree in the cause, direct an inquiry with respect to a document which is insisted upon as affecting the interests of the parties in the matter in question, but is not produced. *Hart v. Hart*, i. 1

2. After several references to the Master, and after the cause had been argued and judgment given on further directions, the Court refused to stay the distribution of the fund and direct a further reference with respect to a new case as against certain creditors, which case it did not appear that the parties might not have previously brought forward, and which was not proved by the evidence adduced. *Philips v. Philips*, iii. 301

3. Considerations which influence the Court in directing inquiries at the hearing of a cause to perfect the evidence on behalf of the plaintiff; and distinction where the inquiries are sought to show that the plaintiff is entitled to relief in the suit, and where the title to some relief being proved, the inquiries are to be directed only to the measure of that relief. *Simmons v. Simmons*, vi. 360

INQUIRY BEFORE THE MASTER.

See EVIDENCE.

INROLMENT OF ORDER.

An order refusing a motion for a new trial of an issue *devisavit vel non*, may be inrolled at the application of either party. *McGregor v. Topham*, iv. 162

INSOLVENT COURT.

See MORTGAGOR AND MORTGAGEE.

INSOLVENT DEBTOR.

See COSTS—EQUITABLE SET-OFF—MORTGAGOR AND MORTGAGEE—VENDOR AND PURCHASER—WITNESS.

1. The assignee of an insolvent debtor is a necessary party to a bill by the insolvent, praying that an instrument which belonged to him, prior to his insolvency, may be delivered up to him, and an injunction to restrain proceedings upon it. *Balls v. Strutt*, 146

2. Under the stat. 7 Geo. 4, c. 57, all persons who are creditors of an insolvent debtor, at the time his petition for discharge is filed in the Court for the Relief

INSOLVENT DEBTOR.

of Insolvent Debtors, are entitled, taking proper steps for that purpose, to participate in his estate, whether the same have or have not been inserted by the insolvent in his schedule. *Borell v. Dann*, ii. 440

3. An insolvent debtor cannot, on the mere allegation that the assignee in the insolvency colludes with a debtor to the estate, and refuses to sue, sustain a suit for a legacy which passed by the assignment of his estate and effects under the insolvency, although charging that the legacy, if recovered, will afford a balance after satisfying all his debts, and praying that the legacy may be paid either to the assignee or to himself: nor can the suit be sustained, even if the provisional assignee cannot empower another party to sue for the insolvent's estate, except by allowing such other party to sue in his (the assignee's) name. *Major v. Auckland*, iii. 77

4. Whether, if the alleged collusion or refusal to sue were proved, the insolvent could sustain such a suit—*quære*. *Id.*

5. The plaintiff filed his petition in the Court of Bankruptcy under the provisions of the Act 5 & 6 Vict. c. 116, for the relief of insolvent debtors not owing more than £300, and passed his examination, and obtained his interim and final orders for protection. He then filed an affidavit in the Court of Bankruptcy, stating that he had satisfied, and obtained a discharge from, all the creditors named in his schedule; and that he had notified such satisfaction and discharge by public advertisement. The plaintiff then applied to the official assignee for a release of his estate, which, according to the provisions of the Act, vested in such assignee on the presentation of the petition; but in the absence of any proviso in the Act for determining the duties of the official assignee in such a case, the plaintiff was unable to obtain any release or reconveyance. The plaintiff then filed his bill against the defendant as mortgagee, for the redemption of an estate, which had been mortgaged before he presented his petition to the Court of Bankruptcy. Upon the objection of the defendant, that the estate of the plaintiff (if any) was vested in the official assignee:—*Held*, that, in the absence of any statutory jurisdiction on the subject in the Court of Bankruptcy, and upon the submission of the assignee, the plaintiff was entitled to sustain the suit at the hearing. *Preston v. Wilson*, v. 185

6. Whether, if the defendant had demurred, the bill would have been sustained—*quære*. *Id.*

7. The clauses of the statute for the relief of insolvent debtors, which provide, that, in case the insolvent shall be entitled

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to any copyhold or customary estate, the assignment to or certified copy of the appointment of the assignee shall be entered on the court rolls of the manor, and that the assignee shall, with all convenient speed, make sale of all the estate and effects of the insolvent, are not mandatory, but are directory only. *Cole v. Coles*, vi. 517

8. The omission of the assignees of an insolvent debtor to sell or take possession of the copyhold estate of the insolvent, or to cause an entry of the assignment or copy of the appointment of the assignee to be made on the court rolls, or to possess themselves of the copies of court roll for a period of nineteen years after the insolvency, whereby the insolvent is enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, does not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignee. *Ib.*

9. An appointment of a person claiming to be a creditor of an insolvent debtor, assignee of his estate and effects in the place of a deceased assignee, on condition that the person so appointed shall prove his debt by affidavit on taking out his appointment, such debt having been afterwards proved accordingly, is a valid appointment, entitling the party so appointed to sustain a suit for the purpose of recovering property claimed as part of the estate of the insolvent. *Ib.*

INSPECTION.

Order upon motion before the hearing, that the plaintiffs and their witnesses should be allowed, until publication, to view and inspect the workings by the defendants in the plaintiffs' mine, of which the defendants were lessees, and which mine was entered and worked by means of a shaft in an adjoining mine belonging to the defendants. *Lewis v. Marsh*, viii. 97

INSPECTION OF DOCUMENTS.

See APPENDIX, vol. ix, p. lxxvi.

INSUFFICIENCY.

See DISCOVERY.

INSUFFICIENT SECURITY.

See TRUSTEE AND CESTUI QUE TRUST.

INSURABLE INTEREST.

See POLICY OF ASSURANCE.

INTEREST OF LEGACY.

INSURANCE AGAINST FIRE.

See MORTGAGOR AND MORTGAGEE.

INTEREST.

See ANNUITY—DEBTOR AND CREDITOR—CO-PLAINTIFFS—JOINT-STOCK COMPANY—STAY OF PROCEEDINGS—VENDOR AND PURCHASER.

1. Interest on debts by judgment recovered against the executor. *Gaunt v. Taylor*, ii. 414

2. The reference to compute interest under the 46th Order of August, 1841, on debts not by law carrying interest, may be made on further directions, although not made at the hearing. *Flintoff v. Haynes*, iv. 309

3. A firm in India collected the estate of a deceased person in that country, under a power of attorney from the administratrix in England, and remitted the amount to their agents, a firm in London, with an order to pay it to the administratrix upon receiving a proper discharge. The London firm declined to pay over the fund to the administratrix, on the ground that the letters of administration which she had obtained did not bear a sufficient stamp. A suit was soon afterwards instituted by other persons, claiming to be next of kin of the intestate, for the administration of the estate, and to restrain the payment to the intestate. The London firm were defendants to the suit. No application was made to pay the money into Court for upwards of ten years, and during the whole of this period it remained in the hands of the London firm, mixed with their own monies:—*Held*, that the London firm was not liable to pay interest on such monies. *Wolfe v. Findlay*, vi. 66

INTEREST OF CHILDREN IN A SETTLEMENT.

See HUSBAND AND WIFE.

INTEREST OF LEGACY.

Where a testator bequeathed an annuity to his granddaughter for her life, and directed, that, if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, and that, from and after the decease of his widow and granddaughter, the value of the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter, if more than one, to be equally divided amongst them when and as they should respectively

INTEREST OF LEGACY.

attain the age of twenty-one years, and if there should be but one, then the whole to such one child, with a gift over, in case of the death of the granddaughter without issue, who should attain the age of twenty-one,—the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother, until they attain the age of twenty-one years. *Festing v. Allen*, v. 575

INTERLOCUTORY PROCEEDINGS.

See EVIDENCE.

INTERPLEADER.

See COSTS.

1. Circumstances under which no costs will be ordered to be paid, as between co-defendants, in an interpleading suit. *Meux v. Bell*, i. 73

2. A supplemental bill of interpleader held to be regular, although filed in respect of a sum amounting to less than £10. *Crawford v. Fisher*, i. 436

3. Observations on the circumstances which render cases properly, or not properly, the subjects of interpleader. *Ib.*

4. *Semble*, a suit of interpleader ought to be so constituted at the hearing, that the decree may embrace the whole property, which is the subject of the claims of the defendants, whereupon the Court is required to adjudicate. *Ib.*

5. A life insurance company received notice of an assignment, by an insurer of a policy which the company had granted, and the insurer afterwards became bankrupt. Soon after the death of the person whose life was assured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, and the company inquired of the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the meantime an action was brought upon the policy by the claimant in the name of the bankrupt, against the company:—*Held*, that it was a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt, and his assignees; and that the assignees, who had in the suit shown no title to the policy, must pay the costs. *Fenn v. Edmonds*, v. 314

6. The right of the plaintiff in interpleader is to be protected not merely from double liability, but from double vexation; and he is not therefore bound to show the

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existence of an apparent title in each of the defendants who are claimants of the property in dispute. *East and West India Dock Company v. Littledale*, vii. 57

7. The stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, although the claimant offering such indemnity shows an apparent title to the property in dispute. *Ib.*

8. A defendant in interpleader cannot generally be ordered to interplead, by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where the defendant seeks, as an indulgence, time to answer beyond that which the general rule allows, he must satisfy the Court that the case cannot with justice be put in a course for determination without further delay; and, in this case, the further time was granted only upon the defendant forthwith proceeding to try his legal right by defending the action which had been brought by the other defendant against the stakeholder. *Ib.*

9. The plaintiff in interpleader undertakes by his suit to use all proper diligence to get in the answer of, or take the bill *pro confesso* against, each of the defendants; and if any delay should occur in such proceedings, any defendant may apply, as against the plaintiff, for a dissolution of the injunction, or for the delivery up of the subject of interpleader, as the case may be. *Ib.*

10. In an interpleader suit, to determine the right of conflicting claimants to portions of an aggregate fund, the Court directed inquiries as to the claims of the several defendants, and reserved further directions and costs. One defendant obtained a separate report finding his title to a portion of the fund, and, being unable to set down the cause on further directions, in consequence of the claimants of the other portions of the fund not having proceeded to establish his title, he presented his petition for payment of the sum found due to him: but the Court refused to order such payment upon petition, or until the cause was heard on further directions and the costs of the suit could be disposed of. *Bruce v. Elwin*, ix. 294

INTERROGATORIES.

See ANSWER—APPENDIX, vol. ix, pp. xxix, lxxvii — DEBT — PARTIES — SUPPLEMENTAL BILL—WITNESS.

1. The affidavit of service of the copy of the bill, under the 23rd Order of August, 1841, on the motion for leave to enter the memorandum of service under the 24th

INTERROGATORIES.

Order, must show that in the copy served the interrogating part was omitted. *Gibson v. Haines*, i. 317

2. A sole defendant, who is specially interrogated to the matter of the bill, and who has taken an office copy of the bill containing the interrogatories, is not exempted from answering the same, on the ground that the interrogatories are not numbered or specified in a note at the foot of the bill. *Lynch v. Leceane*, i. 626

3. *Semble*, the 17th, 18th, and 19th Orders of August, 1841, do not apply to a suit where there is an only defendant. *Id.*

INTESTACY.

See CONSTRUCTION—COVENANT—HEIR AT LAW—NEXT OF KIN—RESIDUARY SHARE.

INTITULING CAUSE.

See MOTION.

INVALID CONTRACT.

See HUSBAND AND WIFE.

INVALID EXECUTION OF POWER.

See EQUITABLE JURISDICTION.

INVESTMENT.

See ADMINISTRATION—CONVERSION—COSTS—LUNACY—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

The testator gave to the executors and trustees appointed by his will so much of his personal estate as would produce a certain annuity, upon trust to select, appropriate, and set apart the same, in their uncontrolled discretion, and pay the interest, dividends, and annual produce thereof to his widow for her life or widowhood; and if the annual produce of the personal estate and effects so set apart and appropriated should from any cause be increased or reduced, his widow was to receive such increased or reduced interest, dividends, and annual produce; and, from and after her decease or second marriage, the testator directed that the personal estate and effects so appropriated or set apart should fall into his residuary estate. And the testator empowered his trustees, at their own discretion, to permit the whole or any part of his personal estate to remain on the securities on which the same might happen to be at his decease, or otherwise to convert and alter the same at their own absolute discretion. The testator's personal estate was invested in foreign funds. The trustees did not exercise their discretion as to the appropriation of the investments to answer the

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annuity, but submitted to act as the Court should direct:—*Held*, that the Court would not direct any appropriation of the foreign funds to answer the annuity to the widow, but would direct the annuity to be raised by the purchase of Consols, referring it to the Master to inquire what part of the existing investments it would be proper for that purpose to call in, having regard to the interests of other parties under the will. *Prendergast v. Lushington*, v. 171

IRREGULARITY.

See AMENDMENT—APPEARANCE—DE BENE ESSE—EXCEPTIONS—MOTION—OFFICE—PLEADING—TAKING PLEADINGS OFF FILE.

IRREGULAR ORDER.

See ORDER.

An order made by the Master, although obtained irregularly, and ex parte as to some of the parties in the cause, cannot be treated by them as a nullity. *Hughes v. Williams*, vi. 71

IRREPARABLE INJURY.

See JURISDICTION.

ISSUE.

See APPENDIX, vol. ix, p. xxx; vol. x, p. xxiv—CONSTRUCTION—DECREE—DEVISE—FAILURE OF ISSUE—LEGACY—REMOTENESS—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27; 7 Will. 4 & 1 Vict. c. 26; *Id.* ss. 3, 24, 33—TRIAL OF ISSUE.

ISSUE MALE.

See LEGACY.

ISSUE ON ACTION.

See TITHES.

ISSUE OR INQUIRY.

See RECTIFYING SETTLEMENT.

JOINT SOLICITORS.

See PARTNERSHIP.

JOINT STOCK BANK SHARES.

See MORTGAGOR AND MORTGAGEE.

JOINT-STOCK COMPANY.

See JURISDICTION—MORTGAGOR AND MORTGAGEE—PARTNERSHIP—PARTIES—RAILWAY COMPANY—SPECIFIC PERFORMANCE—TITLE.

1. When the relation of trustee and

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cestui que trust begins, as between the projectors of public companies and such companies. *Poss v. Harbottle*, ii. 489

2. The plaintiffs, who claimed as trustees of a dissolved banking company, and were proved to have been partners in the company, *held* entitled to sustain a suit, as representing the company, against a defendant who had been in the habit of transacting business with the company, and had dealt with the trustees in that character, and by his answer to the suit made no positive suggestion that the plaintiffs did not sufficiently represent the company. *Gordon v. Pym*, iii. 223

3. Bill by some of the shareholders of a joint-stock bank, on behalf of themselves and all the other shareholders (except the defendants), charging the directors of the bank and others of the defendants with fraudulent misapplication of the funds of the bank; with having borrowed from third parties (who were also defendants) monies in the name of the bank, for private and improper purposes; and with having, by their public officer, suffered judgment to be recovered against the bank, by such third parties, for the amount of such advances, in order that the same might be recovered from the shareholders of the bank; charging also the defendants with making use of the proceedings under the judgment to enforce payment from the shareholders of a call of £3 per share, not warranted by the deed of association; and praying that the debts and liabilities of the bank might be ascertained, and the assets applied in satisfying them, and an injunction issued to restrain process by the defendants (the third parties) against the plaintiffs under the judgment:—*Held*, on demurrer, that certain shareholders of the bank who had paid the call of £3 per share, and who were thereupon, by express engagement with the bank, relieved from proceedings under the judgment, were necessary parties to the suit; and that, inasmuch as such parties, not being named as defendants, must be regarded as plaintiffs under the general description of other shareholders, the suit was improperly framed on the ground of misjoinder. *Lund v. Blanshard*, iv. 9

4. That, where the defendants, the third parties, had aided in the misapplication of the funds in the manner stated, they might be properly made defendants to a suit by the cestui que trust; and that a bill seeking relief both against such third parties and the directors of the bank was not multifarious. *Ib.*

5. The deed of association of a joint-stock company provided that the business of the company should be transacted by

six directors; four directors conducted such business for a considerable time, and had various dealings with a third party, as agent of the company:—*Held*, that it was not competent to such third party to object, in a suit against him, that the four directors did not sufficiently represent the company. *Benson v. Hadfield*, iv. 32

6. Amendment of a bill brought by some of the members of a joint-stock company, on behalf of themselves and all the other shareholders, except the defendants, by striking out "on behalf of themselves and all the other shareholders," &c., and making it the bill of the plaintiffs named on the record only. *Jones v. Rose*, iv. 52

7. A suit by some partners in a joint-stock banking company, on behalf of themselves and the other shareholders, to restrain a creditor of the company from suing the shareholders for a debt alleged to have been inequitably created. The common injunction restrained the defendants from proceeding at law against the plaintiffs touching the matters in question:—*Held*, that the common injunction in terms only protected the plaintiffs named on the record; and that, therefore, a proceeding by the defendants against the other shareholders not individually named was no breach of the injunction. *Lund v. Blanshard*, iv. 290

8. That, if the plaintiffs on the record could procure the other shareholders to submit to the same terms as the plaintiffs on the record must submit to, the Court would, on an interlocutory application by the plaintiffs on the record, give the same relief or protection to the other shareholders as to the plaintiffs on the record. *Ib.*

9. That, in the circumstances of the case, a special application was necessary to give the full benefit of the injunction to the shareholders not named on the record; and that, for such purpose, it was necessary to show that such other shareholders stood in the same situation as the plaintiffs named on the record, but not necessary to show that the other shareholders were, on the merits of the case, entitled to the injunction; and that it was competent to the defendants to show any special circumstances which would make it unjust to extend the benefit of the injunction to the other shareholders. *Ib.*

10. Whether, in a suit by a few of the shareholders of a company, on behalf of themselves and the other shareholders, it is competent to some of such other shareholders, who may disapprove of the suit, to move the Court that the suit, so far as it is instituted on their behalf, may be stayed—*quære*. *S. C.*, iv. 299

11. The solicitor who had projected, and

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at his own expense brought forward, a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the undertaking, that the costs and expenses should be paid by such solicitor and projector, and that the members of such provisional committee should not be personally liable to him for such costs and disbursements, but that the same should be paid out of the fund to arise from the deposits to be paid on the shares:—*Held*, that this agreement was not illegal as between the provisional committee and the shareholders, regarded as trustee and cestui que trust, inasmuch as the trustee was entitled to be indemnified by his cestui que trust in respect of the costs and expenses properly incurred. *Parsons v. Spooner*, v. 102

12. Whether the contract to pay future costs out of the deposits was illegal as between the solicitor and client, attending to the fact that the client, being a trustee, might properly stipulate that he should not be personally liable for the costs to be incurred, but that the same should be paid exclusively out of the trust fund—*quære*. *Ib.*

13. One of the members of the committee of management of a joint-stock company sold his shares to the committee, on behalf the company, at a price not exceeding the market price of the shares at that time. The shares were transferred to the trustees in trust for the company, and the vendor thenceforward ceased to interfere in their affairs. Three years after it was known to the shareholders generally that the shares had been sold to the company, the company having during that time continued the business, and having obtained new parliamentary powers, the plaintiff, on behalf of himself and all the shareholders in the company, filed his bill against the vendor to set aside the sale and transfer of the shares as fraudulent, and to obtain contribution from the vendor towards the debts of the company. The Court refused to disturb the sale, and dismissed the bill with costs. *Walford v. Adie*, v. 112

14. Bill against the directors of a railway company, provisionally registered but not incorporated, brought by A. and B. (alleging themselves to be holders of scrip of certain shares on which they had paid the deposits), on behalf of themselves and all other the shareholders of the company, except the defendants, stating that the objects of the undertaking had been improperly diverted by the defendants, and seeking to charge them with the amount of losses occasioned by their alleged miscon-

duct, and also to have the deposits returned, or the assets administered and the surplus divided. Plea, by one of the defendants, that, before the bill was filed, the plaintiff B. had sold and assigned to one C. the shares in the bill mentioned to have been allotted to B., and that, at the time the bill was filed, all right, title, and interest in the said shares were vested in C., and that B. had at such time no interest therein—allowed; but, owing to the generality of the averments in the plea as to the transaction constituting, or assumed to constitute, the alleged sale and assignment, the costs were reserved. *Doyle v. Muntz*, v. 509

15. *Held*, also, that the bill could not be sustained on the suggestion that B., although he had parted with his interest in the shares, was still liable to third persons, and therefore entitled to call upon the directors to administer the assets of the company in discharge of its liabilities. *Ib.*

16. That the bill could not be maintained on the suggestion that C. was a party to the suit, as being one of the "other shareholders" for whose benefit it was brought, for such "other shareholders" must be not merely other persons, but persons owning other shares than those held, or claimed to be held, by the plaintiffs named on the record. *Ib.*

17. That B. was not in such a case suing as a trustee for C.—that he was not entitled to sue in that character—and that parties allowed in such cases to represent absent shareholders must be parties having the beneficial interest in the shares in respect of which they seek relief. *Ib.*

18. A railway company resolved to raise a sum of money upon loan notes, payable at the end of five years, bearing interest at £5 per cent. in the meantime, with an option to the holders to convert them, at the expiration of three years, into shares of the company, at a certain rate per share, under the powers of an Act of Parliament, to be applied for as early as possible; and the company advertised for tenders accordingly—one-half of the loan to be paid to the company when the tenders should be accepted (February, 1842), one quarter on or before the 15th of April, and the other quarter on or before the 15th of July following. The loan was made by various persons, to whom, on the payment of the last instalment (July, 1842), loan-notes were delivered, promising to pay the sums expressed therein on the 15th of February, 1847, with an indorsement thereon referring to the resolution, and intimating that, in pursuance thereof, application was intended to be made to Parliament for an Act, under the terms of which the bearer

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would be entitled, on the 15th of February, 1845, provided previous notice was given, to convert the loan-notes into shares, at the price mentioned in the resolution. An Act was afterwards obtained, enabling the company, for the purposes therein mentioned, to issue new shares of such amount and to be appropriated and disposed of in such manner, for such prices, and by such ways and means, as by the order of a meeting of the company should be determined. By a meeting of the company, subsequently held, it was resolved that the new shares authorised by the Act should be raised and allotted to and amongst the holders of loan notes, in the manner and upon the terms directed by the Act:—*Held*, that the effect of the Act, and the subsequent resolution of the company was not to allot the new shares amongst all the loan-note holders unconditionally, but only as they had acquired a right to such allotment by virtue of their antecedent contract. *Campbell v. The London and Brighton Railway Company*, v. 519

19. That the term of five years, at the end of which the notes were to be paid off, must be reckoned from February, 1842, when the first instalment of the loan was advanced; and that the three years, during which the holders were to have the option of converting the notes into shares, must be reckoned from the same time. *Ib.*

20. That, from the nature of the property which was the subject of the option, time was of the essence of the contract. *Ib.*

21. That the indorsement on the loan-notes did not enlarge the time of the option by continuing it until limited by an Act of Parliament or otherwise—but whether the company had power to restrict the option, by requiring notice before the 15th of February, 1845, (the end of the three years), or whether the loan-note holders accepting the notes with the indorsement expressing that restriction, without objection or protest, would be bound thereby—*quære*. *Ib.*

22. The company could only be understood as contracting to apply for an Act of Parliament having the effect suggested, but could not be understood as guaranteeing the lenders of the money that such an Act should be obtained. *S. C.*, v. 534

23. The Eastern Union Railway Company was authorised by several Acts of Parliament to make railways from Colchester to Ipswich, from Ipswich to Bury St. Edmunds and Norwich, and from Ipswich to Harwich, and, for those purposes, to raise monies by shares and loans, not exceeding certain sums in the whole. The same company was also, by a distinct Act, authorised to purchase and complete the Hadleigh Junction Railway, and for that

purpose, by shares or loan, to raise a sum not exceeding £100,000. In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the Acts authorising the company to purchase the Hadleigh Junction Railway and make the Harwich line,—charging, that the company was about to misapply the £100,000 raised under the Hadleigh Act in the construction of the Norwich line, and seeking to restrain such misapplication,—the demurrers of the company and the directors for want of equity, were overruled. *Bagshaw v. The Eastern Union Railway Company*, vii. 114

24. Where a company is authorised by Act of Parliament to raise monies for a specific purpose only, it is not competent to any majority of the shareholders of the company to divert such monies to another purpose against the will of a single shareholder; nor could unanimity amongst the shareholders make such a diversion lawful. *Ib.*

25. *Quære*, whether a company, having powers to construct several branch and extension railways, and to raise certain distinct sums of money for such respective works,—such monies being declared to be part of the general capital of the company,—may or may not lawfully apply monies in the execution of one undertaking, which they were empowered to raise for another. *Ib.*

26. The company, in its corporate character, was properly made a defendant to such a suit by some of the members. *Ib.*

27. The proprietor of a scrip certificate, whether registered or not (such proprietor not being in default), may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent, or into which they are convertible, where the proprietors of certificates and stock are very numerous; there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the plaintiff from representing both classes of persons. *Ib.*

28. The original subscriber of the sum represented by the scrip certificate, and vendor of the same to the plaintiff, is not a necessary party to the suit, inasmuch as the contract between such original subscriber and the company gave the former the right to assign his interest and be discharged, and such interest was duly assigned by him to the plaintiff, and the plaintiff was accepted by the company in his stead. *Ib.*

29. Where the absent partners in a numerous partnership are to be bound by proceedings taken in a suit in their absence,

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It is necessary that the parties who represent them on the record should have interests identical with those of the absent parties; and the Court, in such a case, in making a decree which is to bind absent parties, must ascertain, by strict proof, that the parties by whom the cause is conducted have the interests which they allege that they have, and upon which their title to sustain the suit is founded. *Clay v. Rufford*, viii. 281

30. Evidence which, in a suit by some on behalf of the others of the members of a joint-stock company, is necessary to show that the plaintiffs are the managing directors of the company, and that, in such character, they represent the company within the rule of the Court which allows some members of a partnership to represent others who are absent. *Ib.*

31. Cases in which the Court will, at the hearing, give the plaintiffs in such a suit the opportunity of supplying the deficiency of the evidence as to the character which they sustain. *Ib.*

32. After the creation of the original shares in a railway company, a further capital was raised in half shares, upon which a resolution of the directors guaranteed interest at £6 per cent. for ten years. On a motion by a holder of original shares, to restrain the company from paying any interest or dividends on the half shares out of the profits of capital subsequently created, in preference to the interest or dividends on the original shares, and from paying any preferential interest or dividends on the half shares, while any of the floating or unsecured debt of the company was unpaid, except out of the clear profits of the current half-year—the company entered into an undertaking not to make such payments, unless under the authority of Parliament, until the hearing or further order. By a subsequent Act of Parliament it was enacted, that it should be lawful for the company to commute the guarantee attached to the half shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four-fifths of the shareholders of the company at meetings, after notice, as therein mentioned. The directors thereupon proposed to commute the guarantee into an annual payment for each half share in perpetuity. Upon a motion to restrain the company from in any manner acting on or giving effect to the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half shares, while any of the unsecured debt remained due, and except out of the clear profits of the current half-

year, and so far as such profits should be sufficient after payment of such debt, and, upon a cross-motion, to discharge the undertaking:—*Held*, that the Act of Parliament authorising the commutation did not take the case out of the undertaking; and that, therefore, the undertaking was binding until the hearing of the cause, or the further order of the Court. *Stevens v. The South Devon Railway Co.*, ix. 313

33. *Held*, also, that the undertaking was not an agreement which bound the defendants to do nothing in the matter, the subject of the injunction, except under the order of the Court, or unless the Court should be of opinion that what they proposed to do was proper to be done; but was in the nature of an injunction obtained without argument, and which the defendants might apply to discharge. *Ib.*

34. That, upon the construction of the resolution, the holders of half shares were entitled to the guaranteed £6 per cent. out of any funds of the company which could be lawfully so applied, and therefore out of future profits, before any dividend could be payable upon the whole shares. *Ib.*

35. That, independently of the construction of the resolution, the Act of Parliament having authorised a commutation of the guarantee, and the commutation having received the consent required by the Act, the company might lawfully carry it into effect. *Ib.*

36. That the principles which apply to partnerships composed of a limited number of persons, apply to such companies; and that the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, could overrule the minority, upon the question, whether profits should be divided while debts of the partnership were unprovided for. *Ib.*

37. That the manner in which profits were to be ascertained and divided was a question of internal management, and within the power of the company to direct. *Ib.*

38. Bill by one of the shareholders of the Eastern Archipelago Company, which was incorporated by charter, alleging that the public purposes of the grantors of the lands and mines which the company held, and in furtherance of which the plaintiff had subscribed for shares, had not been fulfilled; and that such grants had been diverted in a great degree to private objects; and that the charter had been granted by the Crown on condition that a moiety of the capital should be subscribed for, and a fourth thereof paid up within a limited time, which condition also had not been fulfilled; and that, having failed to

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fulfil such intentions and conditions. it was a fraud on the part of the directors to certify that they had been performed, and to commence the business of the company and make calls, as they had done: and praying repayment of such calls, an injunction to restrain the directors from making calls and carrying on business for the future, and an indemnity to the plaintiff. The company and directors demurred to the bill, and the demurrer was allowed. *Macbride v. Lindsay*, ix. 574

39. A party becoming a member of a public company or corporation upon false representations, made not to him alone but to him and other members, cannot be entitled, on that ground, to any decree for the repayment of his subscriptions, to which the other members would not be equally entitled; and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members. *Ib.*

40. It is no ground for relief in equity at the suit of a shareholder against the company, that the charter from the Crown or the grant to the company from a private person has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant. *Ib.*

41. The provision, that the business of the company should commence from the date of the certificate of the directors that a stipulated number of shares had been subscribed for, and the stipulated capital paid up:—*Held*, not to mean that the company was not to exist antecedently to that date—where the deed also provided that the parties were to be associated, the business to be carried on, and the directors to have power to act for the company, notwithstanding the full number of shares were not subscribed for. *Ib.*

42. The averment in the bill, that the defendants alleged that the other shareholders had concurred (or the admission of the defendants, the directors, that the other shareholders had concurred) in the prosecution of the business of the company, notwithstanding the terms of the charter were not satisfied, does not afford ground for a decree which might prejudice the interests of the other shareholders; for the allegations (or admissions) of the defendants cannot be taken as proof of the conduct, or affect the rights, of such other shareholders. *Ib.*

43. Where it appeared upon the bill that the deed of settlement of the company

was enrolled in court, and that the plaintiff had seen the deed. (the bill stating the number of shares which were subscribed for thereupon), the allegation in the same bill, that the plaintiff was ignorant and unable to discover who the shareholders were, was not, upon demurrer, taken to be a fact: and, in such a case, the Court, weighing one allegation against the other, *held*, that the absence of the other shareholders was not sufficiently accounted for. *Ib.*

44. If a member of a company has a common interest in the subject of his suit with the other members, he must sue on behalf of himself and all the other partners; and if he has not such common interest, the other partners must be represented on the record, that they may be heard upon the question. *S. C.*, ix. 585

45. Effect of the execution of the deed of settlement by the plaintiff. *S. C.*, ix. 590

46. A bill, originally commenced by one on behalf of the other shareholders of an abortive railway company (except the defendants), to recover from the provisional directors and secretary monies alleged to have been abstracted from the company by the fraud of some and negligence of others of the defendants; and afterwards ordered to be prosecuted by the official manager under the Winding-up Act 11 & 12 Vict. c. 45, s. 53—It appeared that the bill had been filed by the former solicitor of the company, and that the original plaintiff had (as stated by the answers, and not denied) been indemnified by such solicitor; and the Court being satisfied, from those and other circumstances, that the suit had its origin in other motives than the benefit of the shareholders, and finding that it was improperly constituted, and that the bill contained charges which ought not to have been made:—*Held*, that, having regard either to its frame or its merits, it ought not to have been adopted by the official manager; and the bill was dismissed, with costs to be paid by him. *The Official Manager of the Grand Trunk or Stafford and Peterborough Union Railway Company v. Brodie*, ix. 823

47. A railway company, having failed in prosecuting the undertaking, resolved to return the unapplied portion of the deposits to the shareholders rateably; and, on the first instalment being repaid, the original scrip certificates were called in and new certificates issued, to the effect that the holders were entitled to a further pro rata division of the balance of the company's funds; and on payment of the final instalment of the unapplied fund, the

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new certificates were called in, and the shareholders were required to sign a memorandum, undertaking to release the directors when called upon to do so:—*Held*, that the terms on which the old and new certificates respectively were delivered up constituted new contracts between the shareholders and the directors; that the persons entering into such contracts in ignorance of the frauds which were alleged to have been committed by the directors, would, on proof of such fraud, be entitled wholly to undo such contracts, but not to set them aside partially, by retaining the instalments and getting rid of the agreement to release the directors; that one shareholder, having no right to make an election for the others, between abiding by the new contracts or setting them aside, could not sue on behalf of himself and all other shareholders to recover from the directors more than the amount which was refunded under the contracts. *Ib.*

48. A purchaser of 173 shares in a banking company executed a deed transferring from the vendor to himself five of such shares, the purchaser thereby covenanting with the vendor and with the public officer of the company, at all times thereafter, in respect of the shares *thereby assigned*, to pay all instalments and sums of money to become due thereon, and also to perform and keep all the covenants and stipulations of the deed of settlement of the company, and also all other stipulations and regulations for the time being affecting holders of shares, and, if required by the directors, to execute a deed of covenant to the trustees or public officer of the company, to observe and abide by all the stipulations and regulations affecting holders of shares in the company. By the deed of settlement, a transferee of shares, not being theretofore a member of the company, and subject to the provision of the deed of settlement, was to become thereby a member of the company as to obligations, but not as to benefits until his execution of the deed of settlement; and a transferee of shares who had previously executed the deed of settlement, was to become a member in respect of the transferred shares from the date of transfer, without again executing the deed:—*Held*, that the execution of the deed of transfer was not constructively or in substance an execution of the deed of settlement; that the covenants of the deed of settlement were incorporated in the deed of transfer only so far as related to the five shares assigned by that deed; and that, by the execution of that deed, the purchaser became a debtor by specialty to the company in respect of such five shares, but not in respect of the other

shares which he purchased, and as to which he executed neither the deed of settlement nor any deed of transfer. *Hay v. Willoughby*, x. 242

49. The deed of settlement of a joint-stock banking company provided, that no person should become a shareholder without the consent of the directors; and in case the board should refuse to consent to any transfer of shares, they should, at the request of the holder, be obliged to purchase the same out of the funds and on behalf of the company, at a price, in case the parties should not agree, to be fixed by arbitration. The plaintiff contracted to sell his shares, but the board refused to consent to the transfer, and he then required the board to purchase them. The plaintiff's shares not being purchased for the company, and an action being afterwards brought against him for calls made subsequently to his application to sell them, he filed his bill to compel the company to purchase the shares, and to restrain the action. On a motion for the injunction:—*Held*, that the fact, that, at the time the application was made by the plaintiff to the board to purchase his shares out of the funds and on behalf of the company, and thenceforward, the company had no funds applicable to the purchase of shares, was a defence to the equity of the plaintiff, founded on the provisions of the deed to compel such purchase; that it did not follow, from the absence of such funds of the company, that the board of directors was, therefore, under all circumstances, bound to adopt the alternative of permitting the plaintiff to transfer his shares to any other person; and *held*, also, that the fact of the price at which the plaintiff had contracted to sell his shares showing that they were then nearly valueless, and the further fact, that, in the following month, the banking company suspended its payments, afforded sufficient *prima facie* evidence that the board were justified in not purchasing or permitting the transfer of the shares to induce the Court to refuse to stay the action for calls until the hearing of the cause, except upon the terms of bringing the amount into Court. *Taft v. Harrison*, x. 489

50. *Held*, also, that the question whether the board was justified by the facts of the case in refusing either to permit the transfer of the shares or to purchase them for the company, was a question to be tried in equity. *Ib.*

51. A landowner, being a peer of Parliament, entered into an agreement with the projectors of a railway, stipulating, among other things, that they should take certain portions of his land, and pay him

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certain specified sums for the same and by way of compensation for permanent injury to his mansion and estate; that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors, and co-operate with them and use his best endeavours to prevent the bill of a rival company from passing into a law; but that if the bill of the rival company should pass, then the first-mentioned company should pay the plaintiff certain sums for the land the rival company might take, and recover from the latter and pay to the first-mentioned company the largest amount of price and compensation which could be obtained; and a provision that either of the parties might determine the agreement by notice to the other if the bill of the first-mentioned company should not pass within six months; and a further provision, that, if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the plaintiff as purchase money and compensation; and that the covenants and agreements concerning the purchase and taking of land, not making deviations without the plaintiff's consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part of the first-mentioned company, so far as the same should be applicable, should be performed by the amalgamated companies. By an Act passed within six months, the subscribers to the two projected companies were incorporated in one body, and authorised to make certain of the projected lines of railway; and it was enacted, that the shareholders of each company should be entitled in certain rates or proportions to the shares of the united company. It was held by the House of Lords, affirming the judgment of the Exchequer Chamber (which reversed that of the Court of Exchequer), that, notwithstanding the bill of the first-mentioned company did not pass, the agreement could not be determined by a notice given by the projectors who were parties to the agreement, or by the amalgamated body. The amalgamated company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in equity brought against them by the landowner, claimed the benefit of the

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agreement, he filed his bill for a specific performance of his contract with the projectors of the first-mentioned company, and moved for an injunction to restrain the incorporated company from permitting any of their trains to pass a certain station near the road mentioned in the agreement without stopping thereat for the accommodation of passengers, &c.:—*Held*, that the union and incorporation of the shareholders of the two companies in one body, and the consolidation of their several shares under the Act of Parliament, constituted an amalgamation within the meaning of the agreement. *The Earl of Lindsey v. The Great Northern R. Company*, x. 664

52. That the amalgamated company was bound by the agreement entered into with the plaintiff by the projectors of the first-mentioned company. *Ib.*

53. That there was no objection to the agreement in point of legality, with reference to the position of the plaintiff as a member of the legislature; and that, especially after the agreement had been the subject of consideration and construction in the House of Lords and in the Court of Queen's Bench, this Court would not refuse to enforce it on any suggestion of illegality. *Ib.*

54. That the plaintiff was therefore entitled to the injunction, and, under the circumstances of the case, upon the interlocutory application, before the hearing of the cause. *Ib.*

55. Construction of the deed of association of a joint-stock banking company, composed of shareholders whose shares had been created at different times, and upon some of which the amount of the shares had, and upon others had not, been required to be paid up, as governing the rights of such several classes of shareholders, with reference to a provision enabling the directors to declare a dividend out of the profits, "and to apply such dividend either as a bonus to be added to the respective shares, or as interest or dividend upon shares or upon the amount paid up in respect of such shares, or as part bonus and part interest or dividend, or otherwise, as they may deem most expedient, and to divide such dividend or bonus into as many equal parts as there shall be shares then held in the capital of the company." *Wilkinson v. Cummins*, xi. 837

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See CY PRES—HUSBAND AND WIFE—TENANCY IN COMMON.

1. Severing joint tenancy. *Wood v. Wood*, iii. 67

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2. A bequest of property to be at the disposal of the testator's wife, for herself and children, does not give the widow a power of appointment, or make the widow and children tenants in common, but creates a joint tenancy. *Crockett v. Crockett*, v. 326

3. A woman, joint tenant of a reversionary interest in a legacy of £2,000 stock, married; and, after the marriage, the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving:—*Held*, that, by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that, upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund. *In the Matter of Newton Barton*, x. 12

4. A bequest of residuary personal estate to A. for life, and should she have a child or children, then to it or them for ever. After the death of the testatrix, A. married, and had issue:—*Held*, that, pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law—the children of A., notwithstanding their interests vested necessarily at different times as they came into esse, took as joint tenants. *Kenworthy v. Ward*, xi. 196

JUDGES OF THE COURTS OF COMMON LAW.

See APPENDIX, vol. ix, p. xxx.

JUDGMENT.

See JURISDICTION—OUTSTANDING TERM
—STATUTES, CONSTRUCTION OF, 13 *Eliz.*
c. 5.

JUDGMENT CREDITOR.

See DEBTOR AND CREDITOR—PARTIES—
STATUTES, CONSTRUCTION OF, 3 & 4 *Will.*
4, c. 27, s. 42; 1 & 2 *Vict.* c. 110, ss. 14, 15.

1. A ship being on her voyage at the time of the assignment of the ship and cargo by way of mortgage, the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees, immediately after her return from the voyage:—*Held*, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of *fi. fa.*, and

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proceeded to take the ship and cargo in execution. *Langton v. Horton*, i. 549

2. An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of *elegit* and attornment of the tenants. *Whitworth v. Gaugain*, iii. 416

3. In a suit by a judgment creditor against his debtor, to give effect to a charge, under the 1 & 2 *Vict.* c. 110, on the interest of the debtor in an estate of which he was mortgagee, which was vested in trustees for sale to satisfy incumbrances and pay the surplus to the mortgagor, a sale of the estates was directed, and, the purchase money proving insufficient to satisfy the charges thereon, the plaintiff was *held* entitled to be paid his debt and costs in priority to the costs of the mortgagor or mortgagee of the estate, or any other of the defendants, except the trustees for sale. *Clare v. Wood*, iv. 81

4. A judgment creditor, who had executed a deed, whereby the real and personal estate of the debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees:—*Held*, that the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment. *Squire v. Ford*, ix. 47

5. That the judgment creditor having assigned his judgment to the trustees of a creditors' deed, in trust for the benefit of the creditors who had executed the deed (of whom he was himself one), was entitled to sue on behalf of himself and all such other creditors, for the establishment of their rights in respect of the trust estate and the execution of the trusts. *Id.*

JUDGMENT CREDITOR OF TESTATOR.

See ADMINISTRATION SUIT.

JURAT.

Form of the jurat in taking the answers of defendants, and particularly where the defendant is illiterate. *Wilton v. Clifton*, ii. 535

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See ACCOUNT—AGREEMENT—BILL OF EXCHANGE—BROKER—CHARITY—CO-DEFENDANTS—DEBTOR AND CREDITOR—

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HERBERT AND KIRK—LARK VENTURA
LIMBART—MAYSON—CHICKLENDON
TAKA—PATTERA—PATTERBIRD—PE
WALTON—BIRD—BIRD RAINBOW AND
BOWMAN—CHATTALA—BOWMAN PER
BOWMAN—CHATTALA—BOWMAN
OR—TACALON.

1. Plaintiff in equity claiming to be admitted to creditors under a fiat in bankruptcy, in respect of a breach of trust by the bankrupts, which was the subject of the suit in equity, applied, on a dividend of the bankrupts' estate being about to be declared, to be allowed to enter a claim upon the proceedings, and to have a fund reserved: the application being refused by the commissioners, it was renewed by petition to the Court of Review, and was also refused by that Court. A supplemental bill was then filed, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the plaintiff's demand: *Held*, that, if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court might, upon general principles, after an adjudication in bankruptcy on the subject of the distribution, to refrain from exercising such jurisdiction. *Thompson v. Derham, Thompson v. Goodman*, i. 358

2. *Nemble*—the Court has no jurisdiction to interfere in the mere distribution of the estate of a bankrupt, either on the ground of trust or otherwise. *Ib.*

8. The Vice-Chancellor cannot, without special authority, hear a motion to discharge an order of the Lord Chancellor, though made upon petition as of course.
Marl of Glengall v. Bland, i. 624

4. The mortgagee of a ship, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, as required by the Registry Act, the registered owner having after that time become bankrupt,—has no equity, distinct from his legal rights, to restrain the sale of the ship by the mortgagee; the title to the ship, after the bankruptcy, depending upon the application of the rule of law with regard to order and disposition. *Campbell v. Thompson*,
ii. 140

8. A banking company, in acknowledgment of monies deposited with them by H., gave him two accountable receipts for \$100 each, on which, according to the course of dealing, interest would be paid. He died; and pending a contest for the administration of his estate, the receipts came into the possession of a stranger, who

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transiently obtained payment from the bank, and the receipts were returned to the bank and cancelled:—*Held*, that the administrator of H. might sustain a suit in equity against the banking company for payment of the sum for which the receipts were given. *Pearce v. Crockett*, 11 286

i. The necessity, arising from the nature of a transaction, to sue in equity for discovery, is a material circumstance to be regarded in considering the jurisdiction of the Court to give relief in the same case; but the necessity of coming into equity for discovery does not necessarily carry with it the right to relief. 11.

7. Where, on a bill for relief, by a plaintiff having a legal demand,—if the Court of Equity had refused its aid, the plaintiff would have been compelled to try his right at law, whilst documents constituting evidence of his right were in the possession of the defendant—the Court, in order to determine the title of the plaintiff to the possession of the documents, being obliged to enter into the legal question, will entertain the whole case, and give the plaintiff the same relief as he would have had at law. *Id.*

8. The next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A., and of the intestate, possessed by A., and on account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate. The bill was taken pro confesso against A. in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him: the Supreme Court decreed that the sums found by the Master to be due to the next of kin and the costs should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this Court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council: and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction

JURISDICTION:

from proceeding in their actions. *Henderson v. Henderson*, iii. 100

9. Demurrer for want of equity allowed, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland. *Ib.*

10. That, inasmuch as the Privy Council is the Court of Appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the Court will not interfere by injunction, on the ground of error or irregularity in the decree of the Colonial Court. *Ib.*

11. Whether, in a case of error shown in the judgment of the Court of a foreign country, from which there was no appeal to any of her Majesty's courts, the decision would be the same—*quære*. *Ib.*

12. The Court having interfered by injunction to restrain the payment of a legal debt, admitted by the debtor to be due to the nominal creditor, has then jurisdiction to decree payment of the debt against the debtor, without sending the party entitled to the payment to recover it by the use at law of the name of the nominal creditor. *Green v. Pledger*, iii. 165

13. Jurisdiction or discretionary power of the Court, by the effect of the statute 8 & 9 Vict. c. 105, s. 2, to vary or relax the terms of the General Orders of August, 1841. *Medhurst v. Allison*, iv. 479

14. The 33rd Order of May, 1845, which enables the Court to order the service of the subpoena to appear and answer upon a defendant out of the jurisdiction, does not apply exclusively to suits concerning lands, stock, or shares, within the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, but gives the Court a discretion, according to the circumstances of the case, to permit such service in any suit whatever. *Whitmore v. Ryan*, iv. 612

15. If relief which is a proper subject of the jurisdiction of another court, be dependent upon relief to be given in this Court, or if the relief which is properly a subject for this Court, cannot be given except that which belongs to another jurisdiction be also given—this Court, to prevent multiplicity of suits, may give both kinds of relief; but if the relief which is sought in a suit be of different kinds, within the jurisdiction of different courts, and independent of each other, although relating to the same transaction—the right in this Court to one kind of relief will not necessarily draw along with it the right to the other; and, therefore, where the bill by a part owner of a ship, against the master and other part owners, prayed an account of the past earnings of the ship,

to which the plaintiff was entitled, his right to that relief afforded no reason for going on to restrain the sailing of the ship until security, according to the practice of the Admiralty Court, was given for the plaintiff's shares. *Castelli v. Cook*, vii. 89

16. *Semble*, the Court of Chancery will not (in a case within its jurisdiction) interfere beyond, or otherwise than, the Court of Admiralty would interfere at the suit of some part owners to control the management or restrain the sailing of the ship—there being no question as to the ownership, and the only dispute being as to the powers of the owners *inter se*. *Ib.*

17. *Quære* whether the Court of Chancery has a concurrent jurisdiction with the Court of Admiralty to restrain the sailing of a ship at the suit of the minority or some of the part owners, until security for its return shall be given by the majority or others; or whether it is necessary that other circumstances should exist, as questions of property or otherwise, to draw the subject within the jurisdiction of the Court of Chancery. *Ib.*

18. Objections to relief, on the ground that, although part that is asked is, yet the other part is not, within the jurisdiction of the Court, are not analogous to objections for multifariousness, where unconnected subjects of equitable jurisdiction are united in the same suit. *Ib.*

19. To the bill of a plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years; that the plaintiff had not discovered his title until a very recent period; and that he had since brought an ejectment against the defendant, to recover the premises, which action stood for trial at the next assizes; and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do—a demurrer, for want of equity, was allowed. *Davenport v. Davenport*, vii. 217

20. The Court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party who is out of the jurisdiction; but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the Court refused to direct an account to be taken of the amount of such produce received by the consignees; for, as the absent party would neither be bound by the

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account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was so found due, to allow in the accounts of his consignees the payments to be made by them in pursuance of such decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose.

Kirwan v. Daniel, vii. 347

21. The plaintiffs contracted to execute works on a railway to the satisfaction of the engineer of the company, by the 1st of October, 1848, making such alterations in and hastening the works, as the engineer should direct; and the company agreed to pay for such works a stipulated sum, and thereof to pay a proportionate part monthly, according to the value of the works which the engineer should certify to have been done, retaining £5 per cent. of the certified amount; and the contract provided that all disputes as to fact, discretion, or opinion, were to be referred to the absolute determination and award of the engineer, whose decision was to be final, and without appeal; and if the engineer should be dissatisfied with the works, the company might take possession of and complete the same, at the expense of the plaintiffs, after giving them fourteen days' notice. The works were delayed, with the assent of the company; but in January, 1849, the engineer required the works to be prosecuted with increased speed, and insisted that the line should be opened on the 1st of June. On the 21st of May, the company gave notice to the plaintiffs, in the terms of the contract, that they would, at the expiration of fourteen days, take possession of and proceed with the works. The plaintiffs thereupon filed their bill to restrain the company from taking such possession, alleging, that when the plaintiffs were proceeding with due speed, the engineer had, by the authority of the directors, ordered that the works should be delayed for a considerable time; that the company had waived the completion of the works by October, 1848; and that the plaintiffs were only bound to carry on and complete the same at a rate computed on the footing of the original contract, and modified by the delay which the company had required; that the engineer had, by the order of the directors, given monthly certificates for less than a fair proportion of the contract sum, according to the work actually done at such times; that a large sum was due to the plaintiffs, which had not been paid; and that the company had not, in fact, paid all the sums which had been certified. The bill denied any default on the part of the plaintiffs, and charged that the notice was

given for the fraudulent purpose of avoiding the payment of sums due to the plaintiffs, and of ejecting them from the works, and procuring other persons to finish the works at an earlier period than the plaintiffs were bound to do. The bill also prayed an account of what was due to the plaintiffs from the company in respect of the works, and an injunction to restrain the company from proceeding against the plaintiffs for penalties under the contract, on the ground of their non-completion. Upon demurrer by the company, it was objected, first, that the contract had not been completed on the part of the plaintiffs, and that it was not a contract of which, as against the plaintiffs, if they had been defendants, the Court could have decreed a specific performance; and, secondly, that the entire control of the works was by the contract given to the engineer, whose decision was to be without appeal; but, *held*, that the plaintiffs were entitled to the aid of a Court of equity, and that the demurrer must be overruled. *Waring v. The Manchester, Sheffield, and Lincolnshire Railway Company,* vii. 482

22. It is no objection to relief in such a case, that it depends on a variation of or departure from the contract made by the directors and officers of an incorporated company, such variation or departure not being made under the authority of their common seal. *Id.*

23. The master of a grammar school appointed by the Dean and Chapter of a Cathedral church, and which grammar school was, by the statutes imposed by the founder, directed to be established and maintained from the endowments of such church, which were held in frankalmoin:—*Held*, not to be a cestui que trust of the stipend and emolument of the office, but to be only an officer of the cathedral church, appointed to perform one of the duties imposed upon it by the statute. *Whiston v. The Dean and Chapter of the Cathedral Church of Rochester,* vii. 532

24. In such a case, whoever may be visitor,—whatever may be the interest of such visitor in the matter in dispute, or whatever may be the right of the schoolmaster to a mandamus or prohibition at law,—the Court of Chancery cannot, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office. *Id.*

25. The Court of Chancery cannot be called upon, in every dispute arising about a right of office, as a matter of course to prevent the party from being displaced until the right shall have been tried. There are cases, even of irreparable mischief, in which the Court cannot give any

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ultimate relief, and will not therefore interfere between adverse claimants. *Ib.*

26. The existence of a suit of multipounding and exoneration, brought by tutors in Scotland in respect of their receipts of the real estate of the infant in that kingdom, constitutes no objection to a decree for an account of the same estates against the same parties in this Court, in a suit by the infant, in which the tutors have appeared. *Beattie v. Johnstone*, viii. 169

27. A party having a legal title may sustain a bill in equity to recover deeds, without first having established his title at law, where a deed to be recovered would be the proper evidence in a trial at law to enforce the legal right against the tenant in possession of the property in question; and notwithstanding the evidence furnished by the deed might have been obtained by means other than a suit in equity. *Elsev v. Lutgens*, viii. 159

28. A., an allottee of shares in a railway company, having executed the subscribers' agreement and parliamentary contract, obtained the scrip certificate of his shares, which he sold; and such scrip certificate, after passing through several hands, was bought by B. The Act incorporating the company was subsequently passed, and advertisements published, calling upon the holders of scrip certificates to register their shares. No application having been made by B., then the holder and owner of the scrip certificate, for registration of the shares which it represented, those shares were registered in the name of A. as the original subscriber, and the sealed certificate was delivered to him. A. immediately sold the shares, to avoid liability for calls; about a year elapsed, and two calls were made after such sale, and before any claim in respect of the shares was made by B. :—*Held*, that, after the registration of the shares in the name of A., B. might have sued in equity for the transfer of the shares by A. to himself (B.), if the shares had not been sold, but had remained in A.'s name; and that it followed, that the Court had jurisdiction to compel A. to account for the purchase-money received by him for the sale of the shares. *Beckett v. Bilbrough*, viii. 188

29. Although the sum recovered by the suit was only £9, yet it was held, that the suit was sustainable, inasmuch as the plaintiff, when he filed his bill, might have been justified in supposing that a larger sum would be recovered, and the defendant, who knew the amount, had not given any information respecting it. *Ib.*

30. Where the Master of the Rolls or the Vice-Chancellor has given substantial relief against a defendant, with costs against

him personally, it is competent to the Court, upon a rehearing by way of appeal, affirming the decree as to the relief, to vary it as to the costs; but such a variation should only be made where the Appeal Court, clearly and without doubt, dissents from the decision of the Court below as to the costs. *Reynell v. Sprye*, viii. 277

31. Jurisdiction in equity to restrain execution upon a judgment against a defendant at law, on the ground of a subsequent release by the plaintiff at law of his claims under the judgment for a valuable consideration paid by the defendant at law, notwithstanding that a rule obtained by the defendant at law, to set aside the judgment, on the ground of such subsequent release had been discharged, and a writ of *audita querela* on the same ground had been set aside by the Court of law. *Williams v. Roberts*, viii. 315

32. Although the writ of *audita querela* is said to be "in the nature of a bill in equity to be relieved against the oppression of the plaintiff," (3 Black. Com. 406); yet the defendant at law is not, either by the existence of that remedy, or by having unsuccessfully resorted to it, precluded from bringing his original bill in equity for relief against the plaintiff, in a case where the Court of law has set aside the writ in a summary proceeding; but whether the fact, that a writ of *audita querela* had been obtained and was in force, would preclude a bill in equity by the same defendant on the same grounds, or would be a case for putting the party to his election—*quære*. *Ib.*

33. Whether the Court will enforce against defendants, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled. *Waterhouse v. Stansfield*, ix. 234

34. If a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitæ* renders incapable of fulfilment, the Court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound by the same equities as affected the party to the contract under whom they claim. *Ib.*

35. The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction do not cease to be governed by the *lex loci rei sitæ*, by the circumstance of such proceeds being

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brought in specie within the jurisdiction.

Ib.

36. A law permitting alienation of land only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; and restraints upon the alienation of land are always governed by the *lex loci rei sitæ*.

Ib.

37. Where a summary jurisdiction is created by Parliament, it must be deemed to be the intention of the Legislature (in the absence of any restriction) that the proceedings under it, when resorted to, shall have the same force and effect as the proceedings under the ordinary jurisdiction for which it is substituted. *Attorney-General v. Bishop of Worcester*, ix. 328

38. The power of the Court to make alterations, as times and circumstances require, in schemes settled by its decrees for the management of charities, does not depend upon the character in which the decree has been made by the Lord Chancellor. *S. C.*, ix. 356

39. Where a legal right exists, the Court cannot refuse to interfere for its protection, upon grounds which depend exclusively on considerations of national policy. *Caldwell v. Vanvlissengen*, ix. 415

40. In a suit to carry into effect an agreement by giving the plaintiffs relief in respect of a breach of the agreement by the defendants, and, at the same time, on the ground of such breach, to remove them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office; the Court, considering the plaintiffs entitled on an interlocutory application to the relief sought, restrained the defendants, by interlocutory order in a supplemental suit, from prosecuting actions at law against the plaintiffs under the agreement to recover damages for removing the defendants from such office. *Brenan v. Preston*, x. 325

41. In a question on the effect of a contract in the circumstances of the case, where the Court had concurrent jurisdiction with a court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing actions at law founded on the facts with regard to which the Court had interfered, and in which actions the same question, of the legal effect of the agreement in the circumstances, would necessarily arise. *Ib.*

42. A case in which the Court on an interlocutory application appointed a ship's husband at the suit of some of the part owners of a ship as against the others,

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LAND-TAX REDEMPTION.

who were, under a contract, ship's husbands as well as part owners. *Ib.*

KNOWLEDGE OF BREACH OF TRUST.

See TRUSTEE AND CESTUI QUE TRUST.

LACHES.

See ACQUIESCENCE — ADMINISTRATION SUIT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. A new letting to an old tenant, commencing immediately, operates as a surrender of the original term; because the lessor could have no power to create the new term, if the original term had subsisted: and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. *M'Donnell v. Pope*, ix. 705

2. The above principle forms the ground of the decision in *Thomas v. Cook* (2 B. & A. 119); and the authority of that case ought not to be carried further than the reason on which it rests. *Ib.*

LANDS.

See INJURIOUSLY AFFECTED.

LANDS CLAUSES CONSOLIDATION ACT.

See SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18.

LAND-TAX REDEMPTION.

1. The legislature intended, by the Acts for the redemption of the land-tax, to authorise all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose, with the like consent, before the passing of the restraining statutes; and, before the restraining statutes, a sale might have been made from a prebendary in his corporate character to a prebendary in his individual character. *Beaden v. King*, ix. 499

2. An objection to the validity of a sale under the Land-tax Redemption Acts, upon the ground that the lands were not properly saleable, and, apart from any question of fraud, were not properly sold under the Acts, is a legal objection; and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. *Ib.*

LAND-TAX REDEMPTION.

3. But, the confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land-tax Redemption Acts, arising from the property so sold not having been originally saleable, or not having been properly sold, within the meaning and according to the directions of the Acts. *Ib.*

4. If it were shown that a purchase under the Land-tax Redemption Acts had been effected by fraud, the Court would rectify it, notwithstanding the confirming statutes; for a purchase so effected would not acquire validity from those statutes. *Ib.*

5. The restriction expressed or implied in the words of sect. 25 of the confirming statute 57 Geo. 3, c. 100—"the titles derived under such sales,"—construed to mean that the Acts were not to operate upon titles anterior to the sales under those Acts, and not to limit the confirmation to the titles of sub-purchasers only. *Ib.*

6. Under the statutes for the redemption of the land-tax, the Lords Commissioners are placed in the position of vendors; and, therefore, if the trustees of a charity should purchase the property of the charity under those Acts, they would not be purchasing from themselves, but from the Lords Commissioners. *Ib.*

7. The confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling (under the Acts) being both vendor and purchaser. *Ib.*

LAPSE.

See CONSTRUCTION—CREDITORS—STATUTES, CONSTRUCTION OF, 7 Will. 4 § 1 *Vict.* c. 26; *Id.* ss. 3, 24, 33.

The testator gave his real and personal estate to his executors, upon trust, after conversion and payment thereof of his debts, funeral and testamentary expenses and legacies, to stand possessed of the residue, and divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will; and he declared that if the net residue of his property, after payment of the debts, &c., should exceed £10,000, then £10,000 only should be applicable to the said trusts (£1,000 to each share); and in that case the testator gave the residue of his said property beyond the sum of £10,000 to his nephews and nieces in equal shares. The net residue after the payment of debts, &c., exceeded £10,000. One of the tenth shares of the £10,000 lapsed by the death, in the testator's lifetime, of one of the ten legatees:—*Held*, that the lapsed share of £1,000 did not pass as residue to the

LEASEHOLD ESTATE.

nephews and nieces, but was undisposed of. *Green v. Pertwee*, v. 249

LAPSE OF TIME.

See LEGACY—PARTNERSHIP.

1. The tenant for life of an estate, who was also devisee in trust in remainder for the children of the testator, with a power of appointment by will amongst them, purchased and obtained from the objects of the power a lease of their reversion at an under value, and devised the estate to her son in fee, charged with debts and legacies. The son took possession of the estate, and paid off the legacies and charges. Fourteen years and a-half after the death of the tenant for life, and seventeen years after the purchase of the reversion, the assignee of one of the vendors, an object of the power, who had become insolvent, filed his bill to set aside the sale:—*Held*, that the lapse of time was a bar to the relief; and that the mere circumstance of the poverty of the cestui que trust was not sufficient to excuse the delay. *Roberts v. Tunstall*, iv. 257

2. *Seem*, that the time which might elapse after such a transaction, during the life of the tenant for life who was the donee of the power, would not alone be considered as amounting to laches. *Ib.*

3. Deed executed in September, 1790 not ineffectual by lapse of time only, in declaring the uses of a fine levied in Hilary Term, 1788. *Parker v. Carter*, iv. 409

4. Effect of length of time elapsing between the transactions complained of and the institution of a suit for relief against them, where the fiduciary character on which the title to relief is founded has de facto ceased for a long period, evidence has been lost, and it has become impossible to restore the defendant to the same position as he would or might have been in, if the suit had been promptly brought. *Beadon v. King*, ix. 532

LEASE.

See COVENANT—FORFEITURE—NOTICE—SPECIFIC PERFORMANCE.

A lease provided, that, in case of any breach of covenant, it should be lawful for the lessor to re-enter and expel the lessee, and the lease should, in that case, be forfeited, and be utterly null and void. The lessee committed a breach by non-payment of rent:—*Seem*, such a lease is voidable and not void. *Bowser v. Colby*, i. 109

LEASEHOLD ESTATE

See CONVERSION—VENDOR AND PURCHASER.

LEGACY.

LEASES FOR LIVES AND YEARS.

See FINES ON RENEWAL.

LEAVE OF COURT.

See SERVICE.

LEGACY.

See ADEMPMENT — ANNUITY — CHARGE — CHILDREN — CONSTRUCTION — COSTS — CREDITORS — EQUITABLE SET-OFF — FAMILY — INTEREST OF LEGACY — LAPSE — MARSHALLING — MISTAKE — NEXT OF KIN — PLEADING — SERVANT SET-OFF — UNCERTAINTY — UNITARIAN CONGREGATIONS — WIFE — WILL.

1. A legacy to be paid to the legatee "when or if" he attained twenty-one, held to be vested at the death of the testator, and not to be contingent upon the legatee attaining twenty-one. *Lister v. Bradley*, i. 10

2. The testator gave certain pecuniary legacies to his daughters respectively, one-half to be invested and secured from the control of any husband, the interest to be paid to them in the meantime, and the principal disposed of as they should direct, to their issue; but in case they should die without issue, he gave the principal among the survivors of his children in equal shares: Held,—that the first bequest was limited to issue living at the death of the children, and that the gift over on failure of issue referred to the same objects. That the gift did not pass the accruing shares of a parent dying, leaving issue, to their issue. *Leeming v. Sherratt*, ii. 14

3. A gift by will of all the interest of the testatrix in certain stock, followed by a codicil directing that a debt owing to her should, at her death, be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock. *Havard v. Price*, ii. 98

4. Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and, in case any of them should be dead at the time of her decease leaving issue, such issue to stand in their parents' place:—Held, first, that no brother or sister who died before the date of the will, was capable of taking under the bequest, and, therefore, the issue of any brother or sister who was dead before the date of the will could not take by substitution; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife; and, thirdly, that the brothers and sisters who survived the

testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. *Gray v. Garman*, ii. 268

5. Several bequests to a servant of the testator, made in eight different instruments, held to be all cumulative, notwithstanding the gift to the party by the last codicil was much larger than any of the preceding gifts to him; and the whole amount given by that codicil was expressed as being given to provide for the servants of the testator. *Suisse v. Lord Lowther*, ii. 424

6. Where a testator makes several gifts to a stranger by different instruments, the presumption is, that such gifts are cumulative, and the circumstance of differences in their character or amount, or of a further motive or reason assigned upon the instrument, tends to strengthen the presumption. *Ib.*

7. The testator, by his will, gave to his executors beneficially all his property which he might not dispose of, subject to his debts, and any bequests which he might afterwards make; and made a codicil of a later date in these words:—"In a codicil to my will, I gave to the Corporation of Gloucester £140,000. In this, I wish my executors would give £60,000 more to them for the same purpose as I have before named." No other codicil was found containing any bequest to or mention of the corporation. On a bill by the corporation, against the executors, and the Attorney-General, for payment of the £140,000 and £60,000, and to have the interest of the corporation therein declared:—Held, that the purpose of both legacies must be deemed to have been the same, and to have been expressed in the codicil referred to, as giving the first legacy. *Gloucester (Mayor, &c.) v. Wood*, iii. 131.

8. That, in construing the codicil, the Court must exclude from its consideration the proceedings before the Ecclesiastical Court, on the question of the admission to probate of the will and codicil. *Ib.*

9. That the plaintiffs must be regarded as admitting, in the suit, that no other circumstances proper for the consideration of this Court, as affecting the claim of the corporation to the legacies, were known. *Ib.*

10. That a bequest of a legacy to an individual for a purpose expressed elsewhere, and which purpose, from some unexplained cause, is unknown to the Court, creates such an uncertainty, that a Court of construction cannot declare the intention of the testator. *Ib.*

11. That, although it was improbable that the legacies to the corporation were

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given in trust for a private person, yet there being no legal presumption that such was not the purpose referred to, the Court could not presume, that, because the legatee was a corporation, the legacy was therefore upon a charitable trust to which uncertainty of object would be no objection. *Ib.*

12. That the proposition that the Court does not presume, and that merely precatory words do not create, a trust, supposes the whole intention of the testator, so far as it had been committed to writing, to be before the Court, and that the uncertainty is occasioned by the intention which is declared; and does not apply to a case in which, from the terms of the bequest, it would appear that there was a written expression of the intention of the testator which is not before the Court, and the uncertainty is occasioned by the absence of that written declaration. *Ib.*

13. That it being the duty of the executors to protect the interests of the residuary legatees against the claims of other persons on the estate, the circumstance that the executors were also residuary legatees was immaterial to the case. *Ib.*

14. Whether, if the plaintiffs, on the construction of the codicil which was proved, would have been held entitled to the legacies, the Court would not—before it treated the absence of the missing codicil as evidence of revocation of the legacies—have inquired into the circumstances relating to that absence—*quare*. *Ib.*

15. The testator, by his will, charged his debts and legacies upon his real and personal estate, and gave such real and personal estate to trustees upon trust for his nephew for life (to whom also he gave a legacy), with remainder to the first and other sons of the nephew successively in tail male, with remainder to the second and every other son of the testator's brother successively in tail male, remainder to the testator's own right heirs; and added, "and upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of £5000 to my niece." The testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mortgage created by the testator in 1765. The brother afterwards died, leaving the nephew, his only son, and then heir-at-law of the testator: the nephew died in 1822, without issue male. The bill was filed in 1837 against the mortgagees and the devisees of the nephew to obtain pay-

ment of the niece's legacy of £5000:—*Held*, that, on the death of the nephew without issue male, the event happened on which the niece would become entitled to the legacy of £5000; and that it was not too remote. *Faulkner v. Daniel*, iii. 199

16. That the nephew was only bound in his lifetime to keep down the interest of the debts and legacies; and that he was entitled to keep on foot, as subsisting charges against the real estate, the principal of the debts and legacies paid off by him, and also his own legacy. *Ib.*

17. That an administrator of the nephew, to whom letters of administration had been granted limited to the purposes of the suit, was a sufficient representative of the personal estate of the nephew in the cause. *Ib.*

18. Devise of real estate to A. for life, subject to the payment of £2000 a piece to B., C., and D., or to their respective lawful issue, twelve months after the death of the testator, and devise of the same estate, in remainder, on the death of A., to his children as he should appoint, charged with a further sum of £3000 a piece to B., C., and D., or to their respective lawful issue. B., C., and D. survived the testator. B. died, without issue, in the lifetime of A., and C. and D. died in the lifetime of A., leaving issue:—*Held*, that the legacies to B., C., and D. vested in the legatees, subject to be divested in favour of their children, in case of their death, leaving children; and, therefore, that B. took both the legacies absolutely, and C. and D. took the legacies of £2000 each, absolutely, and the children of C. and D. took the legacies of £3000 by substitution for their parents. *Salisbury v. Petty*, iii. 86

19. Raising legacy out of real estate. *S. C.*, iii. 94

20. Legatees whose legacies were charged on real estate, subject to prior charges, not affected by lapse of time so long as any of the prior charges subsisted. *Faulkner v. Daniel*, iii. 212

21. Different construction of a bequest to persons who had been creditors, but had been paid in full, where the payment had been made before, and where after the date of the will. *Philips v. Philips*, iii. 298

22. Whether the right of a creditor to a share of the residue would not be sustained, if the principal of his debt had been paid, but he had not received interest upon the debt for the time that the payment was delayed—*quare*. *S. C.*, iii. 303

23. Doctrine of the Court in the construction of testamentary papers containing repeated legacies to the same objects, where the questions are, whether the instruments are intended to be, either wholly or in part, additional or substituted one

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for another, and whether particular legacies contained in such instruments are substitutional or cumulative. *See v. Pinn.* 17. 211

34. Legacies by different instruments to the same legatee, simpliciter, are cumulative, unless the plain effect of the separate gifts is contradicted by the construction of the later instrument, or by presumption of law. *S. C.* 17. 214

35. The right to the repeated legacies in such cases does not depend upon a legal presumption, but is found in the construction and effect of the instruments; and no extrinsic evidence is admissible to prove that the legatee was intended to take one legacy only. *Id.*

36. If the right of the legatee to legacies repeated in different instruments depended upon a legal presumption only, evidence would be admissible to rebut it. *Id.*

37. Whether the words "in addition," in any case, add to the effect of a bequest without those words—*quære*. *S. C.* 17. 214

38. The argument on the omission of the words "in addition" answered, by referring to the omission of the words "in substitution." *S. C.* 17. 211

39. The repetition in the later instrument of some legacies, and not of others, implies that a benefit is intended in the case of the former legatees greater than in the case of the latter. *S. C.* 17. 221

40. The circumstance, that the different legacies carry interest from different dates—or whatever else distinguishes the two legacies—is favourable to the claim of the legatee to both. *S. C.* 17. 223

41. Legacies to strangers differ from legacies to children, in that, in the former case, there is no relative measure of the bounty of the testator, and no ground for presuming that, as to them, every separate instrument is not to have a separate operation. *S. C.* 17. 224

42. Reasoning in aid of the construction of repeated legacies, where the words "in addition" and "in substitution" are used in some cases and not in others, and the latter words are only used in cases where the diversity of the legacies would otherwise prevent them from being construed as substitutionary. *S. C.* 17. 233

43. Application to the earlier instruments of construction of certain words founded upon the use made by the testatrix of those words in the later instruments. *S. C.* 17. 236

44. The right of a legatee, under the general rule of construction, to several legacies bequeathed by different instruments, is not repelled by circumstances which only raise a mere balance of argument that the legacies are substitutional.

In such a case, the preliminary legacies, and not the residuary legacies, are entitled to the benefit of the donor which the form of the bequests has created. *Id.*

45. As to substitutionary instruments. The decision in the case of *The Estate of A. Shaw v. Bancroft* was founded upon the consideration that the codicils were part of the same instrument as the will. *S. C.* 17. 240

46. Cases in which the effect of the first gift would depend in some measure on the events which should happen amongst the legatees, and in which repeated bequests have been construed as substitutionary, from changes amongst the legatees, or alterations in their position, which had occurred between the dates of the several instruments. *S. C.* 17. 243

47. Difference of construction, where all the legatees in a will are provided for in a codicil, and where the codicil contains repetitions of some of the legacies in the will but not of all. *S. C.* 17. 246

48. The testatrix bequeathed £1500 to Mrs. B. for her life, for her separate use, with remainder to her husband for his life, and with remainder to all and every the child and children of Mrs. B., living at her decease, in equal shares. Afterwards, by a codicil, the testatrix revoked the said legacy of £1500 given by her will to Mrs. B., her husband and children, and instead thereof gave £1000 to each of them, upon similar trusts for the said Mrs. B., her husband and children, as were contained in her will as to the £1500. The legatee, Mrs. B., died in the lifetime of the testatrix, leaving her husband and seven children. One child afterwards died in the lifetime of the testatrix:—*Held*, that the husband and six children who survived the testatrix were entitled to £9000, to be settled for the benefit of the husband, with remainder to the children. *S. C.* 17. 225

49. As to the legacy in respect of any child of Mrs. B., who (if Mrs. B. had herself survived the testatrix) should have survived the testatrix, and died in the lifetime of Mrs. B.—*quære*. *Id.*

50. Legacy of £100 to the three sisters of A.; A. had four sisters. The Court will reject the word "three," and give the £100 to the four. *S. C.* 17. 249

51. A release by one of the sisters to the other three does not aid their claim to the legacy under the will. *Id.*

52. Gift to B. for life, with remainder to the children of B. living at his decease, equally between them. B. died in the lifetime of the testatrix, leaving three children, one of whom afterwards died in the lifetime of the testatrix:—*Held*, that there was no lapse of the third part of the legacy by

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the death of one of the children of B. after him and before the testatrix; and that the two surviving children were entitled to the whole legacy. *Lee v. Pain*, iv. 250

43. The testatrix bequeathed "to Mrs. and Miss B., the widow and daughter of the late Rev. Mr. B., £200 each." At the date of the testamentary instrument, there were no persons answering the description. The legacy was claimed by a Mrs. W. (the daughter of the late Mr. B.) and her daughter Miss W. (the granddaughter of the late Mr. B.): and it was proved that the testatrix was intimately acquainted with the late Mr. B., and also with Mrs. and Miss W., and used to call them by Mrs. W.'s maiden name of B.:—*Held*, that this evidence was admissible, and Mrs. and Miss W. were declared to be entitled to the legacies. *S. C.*, iv. 251

44. Bequest to "Miss Sarah Jameson." There was no Miss Sarah Jameson. The testatrix was acquainted with Mrs. Sarah Jameson, and her daughter, Miss Frances Ann Jameson. Frances Ann Jameson was held to be entitled to the legacy. *S. C.*, iv. 253

45. Gift by the will of £100 to Highbury College, and of another £100 by the second codicil, under a gift of that sum to each of the charities mentioned in the will. In the same codicil was a legacy of £500 to Hoxton Academy. The establishment known as Highbury College was formerly called Hoxton Academy. There was no Hoxton Academy at the date of the codicil or subsequently, but other charitable societies had for some time occupied the premises:—*Held*, that Highbury College was entitled to the legacy of £500. *S. C.*, iv. 254

46. Residuary gift, upon trust for the testator's wife for life, if she should so long continue his widow; and, from and after her death or marriage, upon trust to pay and divide the whole thereof equally amongst all and every the testator's nephews and nieces, share and share alike, within six months after they should become entitled thereto:—*Held*, that the residuary share of one who died in the lifetime of the widow passed to his representatives. *Packham v. Gregory*, iv. 396

47. Legacy to A., and, in case A. shall die in the testator's lifetime, without issue, then over. A. died in the testator's lifetime, leaving a child: the child is not entitled to the legacy. *Cooper v. Pitcher*, iv. 485

48. Where a testator, after giving legacies to his daughters for their respective lives, with remainder to their respective issue, and in default of issue, the share of the daughter so dying to the survivors, directed, that, in case any or either of his daughters should happen to die before such

legacy or bequest shall have become vested in her, leaving issue, then such legacy or bequest should descend to, or become the property of such issue: it was *held*, that the word "survivor" must be taken in its strict sense; but that, under the clause of substitution, a survivor's share of a legacy to a daughter who died without leaving issue (such survivor's share being necessarily contingent upon survivorship) passed to the children of a daughter of the testator who died in his lifetime, leaving issue that survived him. *Willets v. Willets*, vii. 38

49. The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life, and directed that after her death his trustees should sell his real estate, "and pay, distribute, and divide" the money thence arising, and the money at interest; and he thereby gave and bequeathed one-third thereof unto his cousin, J. S., "if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike." J. S. died in the lifetime of the testator's widow, leaving a widow and children:—*Held*, that, upon the death of J. S., his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate according to the Statute of Distributions, took vested interests in the third of the residue, in equal shares, as tenants in common. *Smith v. Palmer*, vii. 225

50. Gift of stock in the public funds, upon trust to pay the dividends to the four brothers and two sisters of the testator, in equal shares, for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the survivors and survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies *ad infinitum*, for ever:—*Held*, that the bequests to the brothers and sisters of the testator were valid. *Harvey v. Towell*, vii. 231

51. That the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid; but that such eldest sons took absolute interests in their several shares of such stock. *Ib.*

52. Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the

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death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named (with exceptions), rateably and in proportion to the amount of their respective legacies. The wife survived the testator:—*Held*, that the “legatees before named” should be construed to be the legatees taking benefits out of the fund which fell in at the wife’s death, and the “legacies” to be such legacies as remained to be satisfied at the expiration of the ten years. *Bromley v. Wright*, vii. 334

53. That annuitants for life, not having other legacies, were legatees of shares in the residue. *Ib.*

54. That the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies. *Ib.*

55. That annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies. *Ib.*

56. That a class described as “the children” of B., but not otherwise named, came within the description of “legatees before named.” *Ib.*

57. That the widow of the testator did not take under the residuary gift. *Ib.*

58. That the annuities which ceased at the expiration of the ten years, were not legacies in respect of which the annuitants took any share in the residue. *Ib.*

59. If it be doubtful on the words of a will, whether a specific or general legacy is given, the rule of the court is to lean to the construction which makes the legacy general; but this rule does not involve the proposition that the court is to address itself to the construction of a will with any prepossession one way or the other. *Sayer v. Sayer, Innes v. Sayer*, vii. 382

60. A bequest of £5,000 Consols, with a direction, that, if the testatrix should not have sufficient stock to answer the legacy, her executors should, out of her residuary estate, purchase enough to make up the deficiency:—*Held*, to create a specific, and not a merely demonstrative legacy. *Townsend v. Martin*, vii. 471

61. A gift to all the grandchildren of the testatrix, “with the exception of one, viz. —” established as a gift to the

class, not affected by the incomplete exception. *Millingworth v. Cooke*, ix. 57

62. A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator’s grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson’s children, with remainder, in default of such issue, over:—*Held*, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority and was not applied in his maintenance. *In re Rouse’s Estate*, ix. 649

63. That the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority. *Ib.*

64. A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Ib.*

65. Legacies of £1,000 each to the three children then living of A., the testator’s daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of £2,000 to trustees, upon trust for A., and for her life; and, from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso, that, if any one or more of the children of A. should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children equally; and a declaration, that, if all the children of A. should die under twenty-one, and without leaving issue, the legacies of £1,000 a-piece should not be payable; but, from and after the decease of the last surviving child, the said legacies—and from and after the decease of her daughter,

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the £2,000—should sink into the residue:—*Held*, that the rights of the children of A. in the legacy of £2,000 were contingent upon their surviving their mother. *Farrer v. Barker*, ix. 737

66. Some of the reasons which have influenced the Court in decisions in favour of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself in loco parentis.

Ib.

67. Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided amongst his children living at that period, or to their heirs, and one-third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living, and to their heirs:—*Held*, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children, “or to their heirs,” but that the word “or” must be read “and;” and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan v. Reynolds*, ix. 796

68. The testator bequeathed his residuary estate to trustees, upon trust to pay the interest thereof, after the decease of a tenant for life, to John, Robert, and Ann, for five years, and at the expiration of that term to pay them £5000 a-piece, and then to pay the interest of the remainder for a further term of three years to John, Robert, and Ann, in equal shares; and at the expiration of that time to pay the whole to John, Robert, and Ann in equal shares. Soon after the death of the tenant for life, and before the expiration of the five years, John and Robert claimed and obtained from the trustees payment of the whole of their two-thirds of the residuary estate of the testator; but it was *held* that the husband of Ann was not entitled to immediate payment of her share of the capital, and that he was unable to give an effectual release or discharge for the same. *Harley v. Harley*, x. 325

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69. The testator gave all his household furniture, linen, wearing apparel, books, plate, wines, fixtures, statues, china, horses, carriages, and everything in his house, to trustees, of whom his wife was one, and directed that all his household property “as aforesaid” should, after his decease, be sold, “with the exception of such articles, whatever they be, that my dear wife may desire to retain for her own use; which I hereby empower her to appropriate to her own use:”—*Held*, that this bequest did not enable the widow to take the whole of the household property, but intimated a confidence that she would not take the whole; that she was empowered to make her selection as well from amongst the statues, pictures, and ornamental articles as from the ordinary furniture; and that she was entitled absolutely to the articles which she might select. *Kennedy v. Kennedy*, x. 438

70. A bequest of residuary estate to be invested in consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease:—*Held* to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator, subject to be opened and let in grandchildren who might be born before the expiration of the twenty years. *Oppenheim v. Henry*, x. 441.

71. In a bequest of £1,000 to certain persons for life, and (after their decease) of £400 part thereof to A. and B., part and part alike, viz. £200 to A. and £200 to B., for the trouble they might have in the execution of the will, “but in case of either of their death,” to the survivor; “and in case of both their deaths, to the heirs, executors, and administrators of such survivor, £200 only.” The words “in case of death” were *held* to refer to death in the lifetime of the tenant for life of the £1000. *Green v. Barrow*, x. 459

72. The testator bequeathed £5000 to his wife for life, and after her decease to his nephew absolutely; but if the nephew should die in the lifetime of the wife, then he directed his executors to divide the same amongst the children of the nephew; and in case the nephew should die without leaving lawful issue, then to pay the same unto and equally between his two nieces, Louisa and Georgiana, for their separate use; and in case one or both of the nieces should die in the lifetime of the wife, then to pay and divide the share of the nieces so dying unto and equally between her children as tenants in common; and the testator bequeathed all monies in the public

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funds of which he should die possessed, upon trust for his wife for her life, and after her death for the benefit of his nieces, Louisa and Georgiana, in manner therein-before directed of and concerning the sum of £5000; and he gave all the residue, except monies in the funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—*Held*, that the gift of the £5000 to the children of the nieces could not be regarded as a part or modification of the gift to the mother, but was in fact a substitutionary gift to arise on a distinct event;—that the reference to the bequest of the £5000 in the residuary gift of the monies in the funds, by the words “in manner herein-before directed,” might refer to the manner of taking as tenants in common, or for their separate use;—that the children of the niece did not, therefore, by virtue of the reference, take any interest in the residue of the monies in the funds; and that, as to such monies, so far as related to the share of the deceased niece, there was an intestacy. *Lumley v. Robbins*, x. 621

73. A direction to invest so much money as will produce a certain amount of stock:—*Held* to be a pecuniary legacy. *Edwards v. Hall*, xi. 23

74. Where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, the Court held that the signature of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen; and that the legacy to the wife of one of them failed, under the statute 7 Will. 4 § 1 Vict. c. 26, s. 15. *Wigan v. Rowland*, xi. 157

75. A legacy of a sum of money owing to the testator by A. B., upon a mortgage of certain premises therein mentioned, and which mortgage was paid off in the testator's lifetime after the date of the will, *held* to be a specific and not a merely demonstrative legacy, and to be adeemed by such payment. *Sidebotham v. Watson*, xi. 170

76. The testator placed part of the mortgage-money received by him from A. B. in a bank, and afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance, amounting to a moiety of the sum which had constituted the mortgage debt; but it was *held*, that the specific legatee of the mortgage debt was not entitled in respect of such legacy to the money so remaining in the bank. *Ib.*

77. A legacy given by the testator to his “niece, the daughter” of his late sister Sarah:—*Held*, to be taken by his nephew, the son and only child of his deceased

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sister Sarah Ann. *In re the Trusts of the Will of James Rickitt*, xi. 299

78. A residuary bequest to the nephews and nieces of the testatrix who should be in England at the time of her decease, and the children of such of her nephews and nieces as should be then dead living in England, such children taking only their, his, or her parent or parents' share; and to her great niece, J., and the children of her deceased niece, M., such last-mentioned children only to take one of such shares in right of their mother, equally among them:—*Held*, that two nieces, who at the date of the will and at the death of the testatrix were settled in America were excluded, and that two nieces who at the time of the testatrix's death were in Ireland—one with her husband on duty with his regiment, and the other visiting her—were not excluded. *Woods v. Townley*, xi. 314

79. That J. and the children of M. were entitled to take shares as members of the class of children, and also other shares as special legatees. *Ib.*

LEGACY CHARGED ON REAL ESTATE.

See GENERAL ORDERS, 1841, August, r. xxx.

LEGACY FOR THE PUBLIC BENEFIT.

See CHARITABLE TRUST OR USE.

LEGACY TO A WIFE, FOR HERSELF AND CHILDREN.

See JOINT TENANCY.

LEGACY DUTY ACT.

See APPENDIX, vol. ix, p. xxx.

LEGAL ESTATE.

See JURISDICTION.

Devise to trustees and their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others which in themselves would not do so,—the whole legal fee remains in the trustees. *Brown v. Whiteway*, viii. 145

LEGAL REPRESENTATIVE.

See LEGACY.

LEGAL TITLE.

See SHIP.

LEGATEE.

See APPORTIONMENT—DEBTOR AND CREDITOR.

LEGATEE.

DITOR—DESCRIPTION—MALE LINE—
PARTIES—PRELIMINARY INQUIRIES—
STATUTES, CONSTRUCTION OF, 7 Will. 4
& 1 Vict. c. 26, ss. 3, 24, 33.

LEGATEES' SUIT.

See ACCOUNT—ADMINISTRATION SUIT—
APPENDIX, vol. x, p. xxiv—COSTS.

It is no objection to the hearing of a suit for a pecuniary legacy in which assets are admitted, that a decree for the administration of the estate of the testator has been made at the suit of a residuary legatee; but whether the Court would direct the accounts of the same estate to be taken in both suits—*quære*. *Suisse v. Lord Lowther*, ii. 424

LESSOR AND LESSEE.

See LESSOR'S TITLE—NOTICE—VENDOR AND PURCHASER.

1. The Court refuses to relieve lessees against the legal consequences of breaches of covenant, as well in cases which rest in contract, as where the legal relation between the parties is fully established. *Gregory v. Wilson*, ix. 683

2. Neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of such covenants, will the Court relieve the tenant against the consequences of the breach. *Ib.*

3. A tenant is not absolved from the performance of the covenants of his lease by a notice to quit: such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenant. *Ib.*

4. The fact of there being no personal representative of a lessee on whom the duty of performing the covenants of the lease has devolved, cannot be set up against the landlord. *Ib.*

5. It must be a strong case of equity created by a landlord against himself to control his legal right. *Ib.*

6. Claim by a lessor for the administration of the estate of his lessee, and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease—dismissed. *King v. Malcott*, ix. 692

7. It is not a part of the contract between a lessor and lessee, that, on the death of the lessee, his assets shall be impounded to answer the future rent and covenants; and if any portion of the assets are retained or appropriated for that purpose, it is from the right of the executor to indemnity, and not from any right which the lessor has to require such security. *Ib.*

8. There is no principle on which a court of equity should extend the legal

LIABILITY.

right or remedy of the landlord, as against the tenant or his estate. *Ib.*

9. The Bishop of Winchester, the lessor of lands of the see, demised for lives and years:—*Held*, not to be entitled to any portion of the purchase-money, and compensation for damage and severance, paid into Court in respect of lands comprised in the demise and taken by a railway company, or to the dividends of such money when invested, on the ground of the diminution of the fine which would be payable until the lease should become renewable. *Ex parte the Bishop of Winchester*, x. 137

LESSOR'S TITLE.

An agreement signed by A. and B. for the sale by A., and purchase by B., of the fixtures in a lease at a certain price; and that A. shall execute an assignment of his interest in the house to B., to bear date on a certain day:—*Held*, to be a contract by B. to take such assignment when executed; and B. having inspected the lease and the assignment to A., and subsequently directed A. to cause an assignment to him, B., to be indorsed *totidem verbis*, it was *held* that B. was precluded from calling for the lessor's title. *Smith v. Capron*, vii. 191

LETTER OF ATTORNEY.

See APPENDIX, vol. ix, p. xxxi—EVIDENCE.

LETTERS OF ADMINISTRATION.

See AMENDMENT—EVIDENCE.

1. A trust fund paid into the Court of Chancery, under the Trustee Relief Act, after the death of the cestui que trust, ordered to be paid to the administrator of the cestui que trust under a grant of letters of administration by the Archdeaconry Court, obtained after the fund was in the Court of Chancery. *In re Trust Estate of Elizabeth Spencer*, ix. 410

2. Where a diocesan probate is proper with reference to the situation of the assets at the death, it remains so notwithstanding they may afterwards be rightfully or wrongfully removed out of the diocese. *Ib.*

LIABILITY.

See PARTNERSHIP—TRUSTEE AND CESTUI QUE TRUST.

LIABILITY OF MORTGAGEE OF JOINT-STOCK BANK SHARES TO BANK DEBTS.

See MORTGAGOR AND MORTGAGEE.

LIEN.

LIABILITY OF THE ESTATE OF A DECEASED PARTNER.

See PARTNERSHIP.

LIABILITY OF THE PARTIES TO A CONTRACT, TO THIRD PERSONS.

See ANNUITY.

LIABILITY OF SHAREHOLDERS.

See JOINT-STOCK COMPANY.

LICENCE.

See VENDOR AND PURCHASER.

LIEN.

See ASSIGNMENT—COPYRIGHT—COSTS—CREDITORS' SUIT—FINE ON RENEWAL—LIS PENDENS—MISTAKE—NOTICE—PARTNERSHIP—PLEA—POLICY OF ASSURANCE—PRINCIPAL AND AGENT—SHIP—SHIP REGISTRY ACTS—SOLICITOR—SOLICITOR AND CLIENT—STAMP—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. The solicitor of an executrix and devisee, paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily and by force of the transaction alone, acquire a lien upon the estate, or on the title-deeds, for the sum which he so paid. *Christian v. Field*, ii. 177

2. The solicitor of the executrix having paid a sum which was due to a third party, who had a lien on title-deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and, as her solicitor, carried into the Master's office her examination, in which the sum he had so paid was stated to have been paid by the executrix, and was allowed accordingly:—*Held*, that the solicitor must, in such circumstances, be presumed to have made the payment on the behalf and on the personal security of his client; and that he could not claim a lien upon the deeds for the amount. *Ib.*

3. Where a party has employed, as his solicitors in a cause, a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to

LIFE ASSURANCE.

his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors. *Griffiths v. Griffiths*, ii. 587

4. The lien of a solicitor in the cause held not to entitle him to withhold an original order of the Court in which there was an accidental error that required correction. *Bird v. Heath*, vi. 236

5. The term "lien" does not properly describe the right of a part owner to be reimbursed, out of the gross freight, the amount of expenses incurred in the prior repair and outfit of the ship. *Green v. Briggs*, vi. 400

6. The lien of a solicitor on the deeds of his client is a legal right, which cannot be greater in extent than the interest of the client in the deeds, and does not enable the solicitor to retain the deeds against third parties where the client could not as against such third parties give the solicitor a lien upon the property to which the deeds relate. In determining the extent of such lien, equity follows the law; and although the deeds might have come to the possession of the solicitor, without notice of a prior equitable claim, the Court gives effect as against the solicitor to such prior equitable right. *Pelly v. Wathen*, vii. 351

7. A solicitor does not, as solicitor, acquire a lien for his costs upon the documents of his client which came into the possession of the solicitor, not in that character, but as mortgagee of the client's estate. *Ib.*

8. A solicitor does not acquire a lien for costs due to himself solely, upon documents which came into the joint possession of himself and his partner or partners; but he does not lose his lien for such costs upon documents which, having come into his own possession, are afterwards continued in the possession of himself and his partner or partners. *Ib.*

LIFE ANNUITY.

See CONSIDERATION.

LIFE ASSURANCE.

See ACCUMULATION—FINES ON RENEWAL

1. The defendant, a creditor, agreed that judgment should not be entered up against the plaintiff, his debtor, upon a warrant of attorney, unless default should be made in the payment of the premiums of a policy of life assurance, which was effected to secure the debt; and that payment of the debt should not be required so long as the policy was kept on foot. The plaintiff permitted the time for payment of the premium to expire; and four days afterwards the defendant paid the premium, and pro-

LIFE ASSURANCE.

cured the policy to be revived. The Court refused to relieve the plaintiff against the consequence of his default in payment of the premium, and dismissed a bill brought by him to restrain the defendant from suing out execution against the plaintiff on the judgment. *Winthrop v. Murray*,
viii. 214

2. The stat. 14 Geo. 3, c. 48, does not prohibit a policy of life assurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an assurance in any way contravene the policy of the statute. *Collett v. Morrison*,
ix. 162

3. An assurance company, having had the chance of a contract of life assurance turning out in their favour, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it. *Ib.*

LIFE ESTATE.

See DEVISE—HUSBAND AND WIFE—
REMOTENESS.

1. Bequest of property (monies to be laid out in land) to L., and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son in any of the cases, then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons:—*Held*, upon the language of the whole will, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession; and that L. took an estate for life only. *East v. Twyford*,
ix. 713

2. Intention to give life estates to persons not born in the lifetime of the testator aided, so far as the law will allow, by the cy-pres doctrine. *S. C.*,
ix. 729

LIFE INTEREST.

See HUSBAND AND WIFE—VENDOR AND
PURCHASER.

LIMITATION TO ILLEGITIMATE CHILDREN.

The objection to the validity of a limitation to unborn illegitimate children is not founded exclusively on the uncertainty of description; nor, *semble*, is there any distinction between the validity of a limitation

LUNACY.

in favour of such persons, whether described as the children of a man or the children of a woman. *Dover v. Alexander*,
ii. 275

LIMITATION OVER.

See ALIENATION.

1. There is no rule that a life interest may not be well determined by a proviso for cesser, although it be not accompanied by any limitation over—*Semble*. *Rochford v. Hackman*,
ix. 481

2. No greater effect can be given to a limitation over than to an express declaration that the life interest shall cease. *Ib.*

LIMITED ADMINISTRATION.

See EXECUTOR AND ADMINISTRATOR—
LEGACY.

LIS PENDENS.

See PARTIES—TRUSTEE.

The right of the vendor to recover the purchase-money, as a lien or charge upon the land, is not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, for the administration of his estate; nor by suits by the residuary devisees and legatees of the purchaser for the administration of his estate. *Toft v. Stephenson*, vii. 1

LITERARY PROPERTY.

See PIRACY.

LOAN.

See TRUSTEE AND CESTUI QUE TRUST.

LOAN NOTES.

See JOINT-STOCK COMPANY.

LOCAL ACT.

See ACT OF PARLIAMENT.

LORD OF MANOR.

See ESCHEAT—RECEIVER.

LUNACY.

1. A bill to set aside, on the ground of lunacy and fraud, a conveyance of an estate by a party claiming the fee simple. The lunacy was established, but it appeared that the plaintiff was only entitled to a life estate in the property:—*Held*, that the plaintiff (and his personal representative after his death) was entitled to an account of the rents and profits during the life of

LUNACY.

the plaintiff, as against the parties in possession under the conveyance. *Price v. Berrington*, vii. 394

2. A bill was brought to set aside a deed of 1809, on the ground that the plaintiff, the grantor, was of unsound mind. The plaintiff was by inquisition found to have been lunatic, without lucid intervals, from 1796. The defendants alleged, that, by a deed of 1805, the lunatic had settled the estate for himself and wife for their lives, and for the benefit of their children in remainder. The children were made parties to the suit, and disclaimed, and offered to convey any interest they might have as the Court should direct:—*Held*, that this disclaimer and submission did not reinvest in the lunatic the interest which he would have had if the deed of 1805 had not existed, or entitle him to the relief which he might have had if the deed of 1805 had not been made; but, in confining the decree to the interest which had been reserved to the lunatic, the Court declared that it should be without prejudice to the rights of the children. *Ib.*

3. In a suit to set aside an appointment, on the ground of the unsoundness of mind of the appointor, who was the tenant for life of the estate, parties who would be entitled in remainder in default of appointment cannot, either by joining as plaintiffs in a supplemental suit, or by offering in their answer to convey their interests for the plaintiff's benefit, enable the plaintiff to sustain the suit in respect of any relief beyond the duration of his own life estate. *Ib.*

4. On revivor by a party, who was both heir-at-law and administrator of a lunatic, in a suit to set aside a conveyance made by the lunatic of his estate, it was *held* that the plaintiff had no title to the estate as heir-at-law; but that, as administrator of the lunatic, he was entitled to an account of the rents and profits during the life of the lunatic. *Ib.*

5. Where an equitable interest in an estate has been conveyed by a person of unsound mind to a party taking without fraud or notice of the unsoundness of mind, and the case is one in which the deed would be void at law on the ground of the lunacy, equity will relieve against the conveyance by the lunatic. *Ib.*

6. Investment of a fund belonging to a lunatic in an annuity for his life. *In re Dodworth's Trust*. x. 16

LUNATIC.

See GUARDIAN AND LITEM—STATUTES,
! CONSTRUCTION OF, 1 *Will.* 4, c. 60.

The order appointing a solicitor to be

MALE LINE,

the guardian ad litem of a lunatic, not found so by commission, may be made under the 28th Order of October, 1842. on the application of the plaintiff; but it cannot be made without service of notice upon the alleged lunatic. *Brooks v. Jobling*, ii. 153

MAINTENANCE.

See ABSOLUTE INTEREST—ALIENATION—
CHAMPERTY—CHILDREN—LEGACY—
PORTION—REMOTENESS—SPECIFIC
PERFORMANCE—WILL.

The testator directed that all and every part of his property should be at the disposal of his wife, for herself and her children. The widow took out administration to the testator's estate, and executed a voluntary deed, whereby she settled the greater part of the fund of which the estate consisted, upon trust for herself for life, with remainder to her children:—*Held*, that, under the will, the children took an interest in possession of the property of the testator at his decease, and that the settlement was not binding upon them, and consequently was not binding upon the widow. And the mother maintaining and educating the children in a proper manner, the whole of the income of the residuary estate was ordered to be paid to her during the infancy of the children, or until further order, with liberty to her and her children to apply. *Crockett v. Crockett*, i. 451

MALE LINE.

1. A bequest of the interest of a sum in consols to such of the two brothers and six sisters of the testator as should be living on the day each dividend became due; and, after the death of the last survivor of the brothers and sisters, to such of their children, the nephews and nieces of the testator, as should be living when the dividends became due; and a direction that the residuary estate should accumulate for twenty-one years after the testator's death, and then the whole to the testator's then nearest of kin in the male line in preference to the female line, upon condition that the inheritor should assume the testator's surname if not of that name, and bear his arms with due differences; and in default thereof, to the next in lawful succession, and successively to the heir or successor who should comply with those conditions. The testator died a bachelor:—*Held*, that the words, the "then nearest of kin in the male line in preference to the female line," should not be read as meaning the nearest of kin being a male or males exclusive of

MALE LINE.

females, unless a distinct intention of excluding females were otherwise found in the will; and that no such intention in this case appeared, but, on the contrary, the use of words not indicative of sex, and the provision for taking the surname of the testator, rather indicated the absence of any such intention. *Boys v. Bradley*, x. 389

2. That the words "in the male line in preference to the female," should not be read as in a parenthesis, so as to give merely a preference to the male line, but must be understood as confining the gift to the male line and excluding the female line. *Ib.*

3. That it was not necessary that the person to take the residuary estate under the bequest should derive his title continuously through a line of males, passing by all females; and that the expression, "in the male line," was not equivalent to the expression "in a line of males." *Ib.*

4. That the time of ascertaining the course of descent designated by the words of the bequest was at the death of the testator; and that the bequest did not contemplate a descent from the brothers of the testator in preference to a descent from his sisters; but that it contemplated a descent from his father, and not a descent from his mother; and that the limitation to the nearest of kin in the male line in preference to the female line should be construed as a gift to the nearest of kin *ex parte paterna*. *Ib.*

5. That a sister of the testator, who alone of his sisters and brothers survived the twenty-one years, was the nearest of kin within the description, and entitled to the residuary estate; and this, notwithstanding the same sister was also entitled to the interest of the sum of consols set apart for the brothers, sisters, nephews, and nieces. *Ib.*

MANAGING DIRECTOR.

See JOINT STOCK COMPANY.

MANAGING OWNER.

See PLEADING—SHIP.

MANDAMUS.

See JURISDICTION.

MANOR.

See COPYHOLD.

MARITAL RIGHT.

See FRAUD—HUSBAND AND WIFE.

The equity of the husband to set aside a
525

MARSHALLING.

settlement of the property of his wife, executed by her during the treaty of marriage, without his knowledge, is precluded by his conduct towards her, whereby she is deprived of the power of retiring from the marriage, or, therefore, of stipulating for a settlement. *Taylor v. Pugh*, i. 608

MARRIAGE.

See CONSENT.

MARRIAGE ACT.

See DISCOVERY.

MARRIAGE, RESTRAINT OF.

See CONDITION.

MARRIAGE SETTLEMENT.

See DEBTOR AND CREDITOR—INFANT.

MARRIED WOMAN.

See NEXT FRIEND.

MARSHALLING.

See DEBTOR AND CREDITOR.

1. The testator, by his will, bequeathed an annuity to his wife for her life, and made it a primary charge, in preference to all other legacies, on a leasehold estate, which was (together with certain policies of insurance on the life of the testator) subject to two mortgages; and he directed that, if the rents and profits of such leasehold estate should be insufficient to pay the wife's annuity, then the same should be paid out of his [other] personal estate. The mortgages were paid off by the executors out of the produce of the policies and the general personal estate:—*Held*, that the wife's annuity, so far as it fell upon the personal estate other than the leasehold estate specifically charged, was not entitled to priority over the other legacies. *Johnson v. Child*, iv. 87

2. That the mortgage debts, to which the leasehold estate specifically charged with the annuity was subject, should be apportioned rateably upon the leasehold estate and the policies of insurance, according to their respective value and amount; and that the legatees (other than the wife) were entitled to have the assets marshalled, and to stand in the place of the mortgagees of the leasehold estate, to the extent of that part of the mortgage debts which should be apportioned thereupon. *Ib.*

3. The rule,—where there are two

MARSHALLING.

classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both,—that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. *Scales v. Collins*, ix. 656

4. The Court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid; and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies. *Ib.*

5. One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend. *Tidd v. Lister, Bastil v. Lister*, x. 157

MASTER.

See COMMISSION—CONDUCT OF SALE—PLEA—TRUSTEE AND CESTUI QUE TRUST.

MASTER'S REPORT.

See EXCEPTIONS—OBJECTIONS TO REPORT.

Construction of the 48th Order of the 26th August, 1841, on the framing of the Masters' reports. *Menz v. Bell*, i. 73

MASTER OF A CATHEDRAL GRAMMAR SCHOOL.

See JURISDICTION.

MASTER OF SHIP.

See SHIP.

MEETING-HOUSE.

See STATUTES, CONSTRUCTION OF, 7 & 8 Vict. c. 45.

MEMORANDA, viii. 300, 330.

MEMORIAL.

See ANNUITY.

MISDESCRIPTION.

MERGER.

Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the same estate, the general rule is, that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was his intention, notwithstanding the absence of any other indication of such intention. *Grice v. Shaw*, x. 76

MIDDLESEX REGISTER.

See STATUTES, CONSTRUCTION OF, 7 Ann. c. 20.

MINES.

See INJUNCTION—INSPECTION—TITLE.

1. In a contract for sale of the minerals under a given quantity of surface, at a certain price, payable by instalments, the times of payment to be accelerated if more than a certain quantity of minerals should be gotten from time to time, the vendor impliedly reserves the power of entering and inspecting the mines, to ascertain the quantity of minerals from time to time gotten therefrom; and the vendor is entitled to specific performance of the contract, with a covenant reserving such power in the conveyance. *Blakesley v. Whieldon*, i. 176

2. Devise (before the Statute of Wills, 7 Will. 4 & 1 Vict. c. 26) of certain lands to certain persons, and of pits and veins of clay under the same lands to other persons,—the latter devise passed only the pits and veins of clay open at the date of the will—semble. *Brown v. Whiteway*, viii. 50

3. Whether, since the statute, such a devise would pass pits or veins open at the death of the testator—*quare*. *Ib.*

MINING PARTNERSHIP.

See JOINT STOCK COMPANY.

MINING SHARES.

See DEMURRER.

MINUTES.

See PRIVILEGE—REGISTRAR.

MISDESCRIPTION.

See PLAINTIFF—VENDOR AND PURCHASER.

MISJOINDER.

MISJOINDER.

See JOINT-STOCK COMPANY — TRUSTEE AND CESTUI QUE TRUST.

1. Where several plaintiffs beneficially interested in a trust fund sue the trustees in respect of a breach of trust, and one of such plaintiffs has, in addition to his character as a cestui que trust, become the personal representative of a deceased trustee, who was primarily, or with the other trustees jointly, liable, the suit is improperly framed, and cannot be sustained, notwithstanding it be averred by the bill that the plaintiff has received no assets of the estate of the deceased trustee, and that the trustee died insolvent. *Griffith v. Vanheythuysen*, ix. 85

2. Whether, if the plaintiff, who, in such a case, had become the representative of the accounting party, were the sole plaintiff in the suit, the objection to the suit could be maintained—*quere*. *Ib.*

MISREPRESENTATION.

See BROKER—EVIDENCE.

A. having accepted bills for the accommodation of B., who was unable to take them up, entered into an agreement to provide for payment of half of the amount of the outstanding bills, as they became due—a third person, party to the agreement, charging certain property to the extent of £1,500, for the benefit of A., by way of security, which property such third person alleged to be his own, and a security amply sufficient in value above incumbrances. More than half of the amount of the bills was afterwards paid by A., but the property of the third party charged as a security proved to be heavily incumbered, and insufficient:—*Held*, in a suit by A. against the executors and devisees of the third party, that, the misrepresentation as to the surplus value being proved, A. was entitled to have so much of the sum of £1,500 and interest as the specific property was insufficient to pay, raised and paid out of the general estate of the testator. *Ingram v. Thorpe*, vii. 67

MISTAKE.

See CHARGE—EQUITABLE JURISDICTION—EVIDENCE — IGNORANCE — IMPROVEMENTS — RECTIFYING DEED — VENDOR AND PURCHASER.

1. A mistake of the law or practice of the Court is not, per se, a ground for allowing a party to go into further evidence on facts at issue at the hearing of the cause—*semble*. *Woodgate v. Field*, ii. 211

2. That the Court would not inquire into

MISTAKE OF PRACTICE AT LAW.

the fact of whether a testator was mistaken or not, with reference to his daughter's health or capacity, assigned by his will as a reason for imposing a condition in restraint of marriage. *Morley v. Rennoldson*, ii. 570

3. A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property (erroneously describing it as freehold), to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—*Held*, that the fact of the testatrix having given the estates to A. and B. respectively, in the mistaken supposition that both estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume that the testatrix would have apportioned her bounty differently if the mistake had not occurred. *Westcott v. Culliford*, iii. 265

4. The wife, being entitled in equity to real estate under a contract for sale entered into before her marriage, the husband, after their marriage, completed the purchase and took the conveyance to himself; afterwards, acting upon the supposition that the estate was his own, the husband laid out money in improvements upon it, and ultimately, in the lifetime of the wife, under the same mistake, sold the estate, and the purchasers took a conveyance from him. The husband survived the wife. After the death of the husband, the heir-at-law of the wife recovered the estate from the purchasers by a suit in equity:—*Held*, that the husband, and the purchasers from him, were entitled in that suit to a lien on the estate in respect of the purchase-money paid by the husband; and *semble*, also, in respect of the monies expended on lasting improvements. *Nessom v. Clarkson*, iv. 97

5. That the husband, and the purchasers from him, ought, if they accepted the relief offered to them by way of lien on the estate, to be treated as mortgagees in possession, and in that character to account for the rents and profits received by the husband and the purchasers, as well during the life of the wife as after her death. *Ib.*

MISTAKE OF PRACTICE AT LAW.

The Court refused an injunction to restrain plaintiffs in an action at law from taking out of court money which the de-

MISTAKE OF PRACTICE AT LAW. MORTGAGOR AND MORTGAGEE.

defendants at law had paid into court in the action, in ignorance that, upon such payment, the plaintiffs at law were entitled to stay their action, and take the sum so paid. Such ignorance or inadvertence does not amount to that kind of mistake against the consequences of which equity will interpose to relieve—*semble*. *Great Western Railway Company v. Cripps*, v. 91

MODUS.

See TITHES.

MONEY.

See TRUSTEE AND CESTUI QUE TRUST.

MORTGAGE.

See ADMINISTRATION—COLONIAL LAW—CONVERSION—COSTS—CREDITORS' SUIT—ESCHEAT—FINES ON RENEWAL—FORECLOSURE—INJUNCTION—JURISDICTION—NOTICE—RECEIVER—TENANT FOR LIFE AND REMAINDERMAN—TRUSTEE AND CESTUI QUE TRUST—VOLUNTARY ASSIGNMENT.

1. Assignment of a policy of insurance upon trust, as a collateral security, accompanying a mortgage of real estate:—*Held*, under the circumstances, not to entitle the mortgagee to a decree for the sale of the policy. *Dyson v. Morris*, i. 413

2. Conveyance of real estate upon trust to secure the payment of advances made upon the security thereof, with a power of sale, *held* not to entitle the mortgagee to a decree for foreclosure. *Sampson v. Pattison*, i. 533

3. Bill by the owner of an estate in Demerara, against an incumbrancer thereon, to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the incumbrancer could not deliver up the grosse copy of the acts of hypothecation, which it was alleged was necessary to a valid discharge. The common injunction was obtained. The answer admitted that the incumbrancer had no grosse copy in his possession, and that a second grosse copy would not be issued by the Court without indemnity; but it did not state for what purpose or in whose favour the indemnity was required, or that grosse copies had not been actually taken out in respect of the charges which the defendant had upon the estate, or that any inquiries or searches had been made in reference to these questions, or that any cancellation or discharge had been entered in Court in respect of the previous payments on account of the debt. The plaintiffs and the

defendant had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the grosses. The Court dissolved the injunction, upon the incumbrancer giving security to indemnify the plaintiffs from any consequences arising from the absence of the grosses. *Bentinck v. Wilink*, ii. 1

4. Under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest are secured also by a bond or covenant, is entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt, within twenty years before the institution of the suit. *Du Vigier v. Lee*, ii. 326

5. The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in the like circumstances in a suit by the mortgagee to foreclose. *Ib.*

6. If the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrear of interest—*semble*. *Ib.*

7. The mortgagee of a reversionary interest in stock in the public funds, with a power of sale, may bring his bill for foreclosure; and is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure. *Slade v. Rigg*, iii. 35

8. An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of elegit and attornment of the tenants. *Whitworth v. Gaugain*, iii. 416

MORTGAGE OF TOLLS, &c.

See MORTGAGOR AND MORTGAGEE.

MORTGAGOR AND MORTGAGEE.

See ADVERSE POSSESSION—APPENDIX, vol. x, p. xl—BROKER—BUILDING SOCIETY—CONSIGNEE—COSTS—DEBTOR AND CREDITOR—DECREE—ESCHEAT—HUSBAND AND WIFE—INSOLVENT DEBTOR—JUDGMENT CREDITOR—LIEN—PARTIES—PLEADING—POLICY OF ASSURANCE—PRINCIPAL AND AGENT—PRIORITY OF INCUMBRANCERS—RECEIVER—SHIP—STATUTES, CONSTRUCTION OF, 13 & 14 Vict. c. 60—SUPPLEMENTAL BILL—USURY.

1. A., seised in fee, mortgaged for a term

MORTGAGOR AND MORTGAGEE.

of years, and afterwards devised the mortgaged premises, and died. The mortgagee brought his bill against the devisees, some of whom were infants, for foreclosure:—*Held*, that the defendants, during the infancy of the devisees, were not entitled to a decretal order on motion, under the stat. 7 Geo. 2, c. 20, s. 2, or under the general jurisdiction of the Court, to take an account of what was due. *Taylor v. Coates*, iii. 263

2. The mortgagee or incumbrancer, consenting to a sale of the mortgaged premises in an administration suit, does not thereby waive his right to be paid his principal, interest, and costs out of the monies produced by the sale, in priority to the costs of the plaintiffs in the cause. *Hepworth v. Heslop*, iii. 485

3. A redemption suit. An incumbrancer, to whom a sum greater than the balance found due to him, had been tendered before the bill was filed, ordered to pay the costs. *Roberts v. Williams*, iv. 129

4. Transfer, by way of mortgage, of shares in a banking company. The mortgagor afterwards paid off the debt, and applied for a retransfer of the shares, but the directors of the bank did not permit the retransfer to be made. In the meantime a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as one of the shareholders:—*Held*, that, where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer made on the mortgage, and before the mortgage debt was paid off. *Phené v. Gillan*, v. 1

5. That, the mortgagor having elected to take a retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor; and the mortgagor was bound to indemnify him against the whole expenses or liabilities which he had properly incurred by holding and maintaining the shares. *Ib.*

6. That the mortgagor, indemnifying the mortgagee in respect of the costs, was entitled to take proceedings in the name of the mortgagee, to compel a retransfer of the shares, and to resist the proceedings against the shareholders under the judgment. *Ib.*

7. The mortgagee has not, in such a case, any right at law against the mortgagor—*semble*. *Ib.*

8. Whether the directors of the company, preventing the shares from being retransferred, are necessary parties to the

suit, in order to give the plaintiff complete relief—*quære*. *Ib.*

9. The statute 1 & 2 Vict. c. 110, s. 68, does not make it the duty of a mortgagee, as against the provisional assignee of an insolvent mortgagor, to obtain an order from the commissioners of the Insolvent Debtors' Court for a conveyance of the equity of redemption; and an offer by the provisional assignee to facilitate the proceedings in such an application does not entitle him to his costs in a suit subsequently instituted against him for foreclosure. *Grigg v. Sturgis*, v. 93

10. Stephen took a conveyance of an estate from William, his father, and then mortgaged the estate, with a power of sale on default of payment of the mortgage money and interest within three months after notice in writing given to Stephen, his heirs, executors, administrators, or assigns, or left at his or their usual or last known place of abode. The conveyance to Stephen from William was afterwards declared void, as against the creditors of William. Some years afterwards, the mortgagee caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of Stephen; and the mortgagee, a short time before the expiration of the three months, entered into a contract for the sale of the property:—*Held*, that, as the right of the mortgagee under the power of sale was paramount to that of the creditors of William, the notice to Stephen was sufficient. *Major v. Ward*, v. 598

11. That such notice was well served by being fixed on the door of Stephen's last known place of abode. *Ib.*

12. That the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid. *Ib.*

13. In 1816, the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833, the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 28) was passed, and barred all suits for redemption after twenty years' possession by the mortgagee, and no acknowledgment in the meantime of the right of redemption given

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to the mortgagor or his agent, in writing, signed by the mortgagee. In 1845, the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee:—*Held*, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828; and that the suit (as to that estate) was therefore barred. *Batchelor v. Middleton*, vi. 75

14. A. mortgaged three houses (23, 26, and 27) to B., and afterwards contracted to sell 23 (one of the houses) to C.; C. paid the purchase money to A. under the contract, but without obtaining a conveyance, and with constructive notice of the prior mortgage to B. C. afterwards paid off what was due to B. upon his mortgage, and, having taken a transfer of the mortgage, filed a bill against the devisee of A. and several mortgagees under subsequent mortgages made by A., which included the houses 26 and 27 and other property, and obtained a decree for the specific performance by the devisee of A. of the contract of sale as to the house 23, and for the successive foreclosure of all the subsequent mortgagees, and the devisee of A., in default of their redemption of the houses 26 and 27. *Sober v. Kemp*, vi. 155

15. A. and B., in 1838, filed their bill for the administration of an estate, of the residue of which they were each entitled to one-third. In 1840, they changed their solicitor in the cause, and appointed F. as such solicitor, who so continued until 1843, when they again changed their solicitor. F. then brought his action against A. (B. having gone out of the jurisdiction) for the amount of his bill of costs, and, in June, 1844, he recovered and entered up judgment in such action. In June, 1845, F. filed his bill for foreclosure under the statute 1 & 2 Vict. c. 110, as against A.'s third part of the property, the subject of the first suit. In July, 1846, F. obtained the common decree for foreclosure against A., and (default being made) on the 23rd of March, 1847, the order for foreclosure was made absolute. The order absolute was then enrolled. A. had no property except that to which she was entitled in the first suit, but the value of the property to which she was entitled in that suit was three or four times the amount of F.'s judgment-debt and costs. The Master had made his report in the first suit, and the cause stood for hearing on further directions and on exceptions, when, on an application in June, 1847, the Court enlarged the time appointed by the Master for the payment of the debt and costs,

notwithstanding the order absolute, and notwithstanding its enrolment. *Ford v. Wastell*, vi. 229

16. The representative of a mortgagor, who had obtained a decree for redemption, ordered, on the petition of the mortgagee, to produce the original decree for the purpose of correction. *Bird v. Heath*, vi. 236

17. The mortgagee of a fund in court is entitled to the expense of obtaining a stop-order on the fund in a case in which he is empowered by the mortgage-deed to apply to the Court for that purpose, but such expenses are not allowed by the taxing-master under the common order to tax the costs of the mortgagee. *Waddell v. Taylor*, vi. 307

18. The costs of the petition and order under the statute 1 Will. 4, c. 60, for the reconveyance of a mortgaged estate to the mortgagor, or his representatives, upon payment of the mortgage-money, are to be borne by the mortgagor or his estate, although such proceedings were rendered necessary by the circumstance that the mortgagee had devised the legal estate in the mortgaged premises to three trustees, one of whom could not be found. *King v. Smith*, vi. 473

19. Where a mortgage is made to two for a sum of money, of which each had lent a portion, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant, and the plaintiff in such a suit is entitled to the usual decree of foreclosure on default of payment of the whole mortgage debt, in the proportions due to the plaintiff and defendant respectively, together with their respective costs. *Davenport v. James*, vii. 249

20. A mortgagee having separate mortgages created by the same mortgagor on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of the mortgaged debts, but can only foreclose each estate separately on non-payment of what is secured upon it. *Holmes v. Turner*, vii. 367, n.

21. Form of decree for foreclosure where the mortgagee has a legal mortgage for the whole of his debt on one of the mortgagor's estates, and an equitable mortgage for part of his debt on another of the mortgagor's estates. *Id.*

22. In a suit by a puisne mortgagee to redeem two prior mortgages of distinct portions of the estate comprised in the plaintiff's security, and to foreclose the mortgagor on his default of redemption,—if the Plaintiff should redeem neither of the prior mortgages, he is not entitled to any decree against the

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mortgagor; but the plaintiff in such a suit (the defendants not having objected or not being able to object that the suit is multifarious), may redeem one of the prior mortgages, and obtain a decree for redemption or foreclosure against the mortgagor in respect of that estate, without redeeming the other mortgage, and as to such other mortgage submitting to the dismissal of the bill. *Pelly v. Wathen*, vii. 351

23. A mortgagee of houses, who is not by express contract with the mortgagor entitled to insure the premises against fire at the mortgagor's expense, nor to require the mortgagor so to insure them, is not entitled to add to his mortgage debt, and charge upon the property, the premiums which he may pay for such an insurance effected by him without the privity of the mortgagor. *Dobson v. Land*, viii. 216

24. Distinction between the cases of mortgagees and trustees in the ordinary sense. *S. C.*, viii. 220

25. The principle upon which the Court restrains persons filling a fiduciary character from having any dealings for their own benefit, does not necessarily apply to the case of mortgagor and mortgagee. *S. C.*, viii. 221

26. A mortgagee of a reversionary interest in stock filing a bill to realise his security, is entitled to a decree for foreclosure in default of payment, that being the ordinary method whereby the Court excludes the right of redemption; and although he may, in some cases, be entitled to a decree for sale, there is no rule or practice of the Court which compels him to submit to such a decree. *Wayne v. Hanham*, ix. 62

27. At the hearing of a claim for foreclosure, option will be given to the plaintiff to take either the common order for foreclosure, or an inquiry as to other incumbrances, suspending the order for foreclosure until after the report. *Robinson v. Turner*, ix. 129

28. A legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deeds, unless there be fraud, or gross or wilful negligence on his part; and the Court will not impute fraud or gross or wilful negligence to the legal mortgagee, if he has bona fide inquired for the deeds, and a reasonable excuse has been given for not delivering them to him; but the Court will impute fraud or gross or wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. *Hewitt v. Loosemore*, ix. 449

29. Where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor,

the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction, although the mortgagor, acting as such solicitor, is not paid by the mortgagee; for the nature of the transaction is, that all expenses are borne by the mortgagor. *Ib.*

30. It does not necessarily follow in such a case, because the mortgagor is the solicitor of the mortgagee, that, therefore, the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor. *Ib.*

31. Decree for foreclosure against divers sub-mortgagees and parties having derivative interests under the mortgagor subsequent to the plaintiff, without any inquiry as to their respective priorities. *Long v. Storie*, ix. 551

32. Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey v. Richardson*, ix. 736

33. No right in land situated in the colony of British Guiana is acquired except by a transport or conveyance in Court in the form of a judicial act; and, therefore, an assignment executed in this country of the benefit of a contract for the purchase of land in the colony, as a security for monies lent to the purchaser, to enable him to complete the purchase, confers no right, estate, interest, lien, or charge upon such land; and such land, whether it be or be not actually conveyed to the purchaser in the form required by the law of the colony, by the payment of the purchase-money becomes subject to the claims of the creditors of the purchaser generally, without the necessity of such creditor first proceeding to judgment and execution; and a transport or conveyance cannot, without notice, be made to any party other than the purchaser, thereby affording an opportunity for the general creditors of the purchaser to interpose. *Waterhouse v. Stansfield*, x. 254

34. On a bill by a mortgagor, whose estate had been discharged from the mortgage, and who had taken a re-conveyance, against the mortgagee, for the delivery up of the title deeds, or for an indemnity, it was found that the deeds were lost by the mortgagee or his agent. The Court thereupon refusing to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it, from the absence of the deeds, yet held, that the mortgagor was, upon the authorities, entitled to relief in respect of the additional expense of producing evidence of his title, and directed a reference

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(as in *Hornby v. Matcham*, 16 Sim. 327), to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds. *Brown v. Sewell*, xi. 49

35. Where several mortgages were made under the authority of an Act of Parliament, of a canal navigation and undertaking, and the works, lands, hereditaments, and capital subscription, calls, debts, sums of money, property, estate and effects, belonging, due, or owing, or thereafter to belong, or be due, or owing thereto, and all tolls, rates, and duties arising by virtue of the Acts under which the company was formed—the mortgagees being equally entitled, one with the other, to their proportions of the tolls and premises—the Court, at the suit of one of the mortgagees, whose interest had been a long time unpaid, appointed a receiver of the tolls, rates, and duties, and of the estate of the company. *Fripp v. The Chard Railway Company*; *Fripp v. The Bridgewater and Taunton Canal and Stolford Railway and Harbour Company*, xi. 241

36. A receiver of the rates, tolls, duties, and other property of the company, appointed by the Court at the suit of a mortgagee, whose interest was long in arrear, notwithstanding the Act of incorporation gave the mortgagee in such a case the specific remedy of applying to and obtaining the appointment by two justices of the peace of a receiver of such rates, tolls, and duties, until the interest in arrear, and the costs and charges, should be satisfied, accompanied by a provision that the Act should be without prejudice to any remedies which such mortgagee might have either in law or equity. *Ib.*

37. It is no objection to the appointment of a receiver over the property of a company, whose business is in the nature of a trade, that the application is made by one of several mortgagees, who, according to the terms of their mortgages, have the legal estate in the property; nor is it any objection that the company has duties to perform, the neglect of which might subject them to indictment; for the order of the Court always gives the parties liberty to apply, whereby any such consequence may be averted. *Ib.*

38. A receiver appointed at the suit of a mortgagee having a charge of £10,000, forming about a ninth of the entire mortgage debt of the company, although the other eight-ninths of mortgagees did not concur in the application. *Ib.*

MOTION.

MORTMAIN.

See CHARITABLE TRUST OR USE—DEVISE—EVIDENCE—STATUTES, CONSTRUCTION OF, 9 Geo. 2, c. 36; 7 & 8 Vict. c. 45.

1. Upon an information for the appointment of new trustees of a Dissenters' meeting-house, on the ground that the parties in possession had excluded persons who, according to the trust, were entitled to the use of the premises, and had admitted others to the use of the same who were not entitled thereto: the Court made a decree for the appointment of new trustees, notwithstanding the deed declaring the trust was not enrolled according to the provisions of the Mortmain Act (9 Geo. 2, c. 36), and notwithstanding the defendants who had (permissively) the possession and use of the premises objected, at the hearing, that the deed was void under the statute, the defendant who had the legal estate admitting the trust, and submitting to act as the Court should direct. *Attorney-General v. Ward*, vi. 477

2. The Court will make a decree for the appointment of new trustees of lands for a charitable use, although the deed originally declaring the use be not enrolled under the Mortmain Act, if the trustees in whom the legal estate is vested admit the trust, and do not object that the deed is void under the statute, but submit to act under the direction of the Court. *Ib.*

3. A bequest of a legacy, to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary:—*Held*, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *Attorney-General v. Hull*, ix. 647

MOTION.

See ACCOUNTS—AFFIDAVIT—AFFIDAVIT OF SERVICE—AMENDMENT—APPENDIX, vol. x, p. xxiv—AWARD—COSTS—DECREE—DISMISSAL OF BILL—INJUNCTION—MORTGAGOR AND MORTGAGEE—ORDER—PAYMENT INTO COURT—RECEIVER—SERVICE—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27—TRUST—VENDOR AND PURCHASER—WITNESS.

1. A motion to make an award an order of Court is not a motion of course, but is a special motion to be made upon notice *Wilkinson v. Page*, i. 280

2. Order made upon motion, fixing a time for the performance of an act, which a decree made upon a bill taken pro confesso had ordered to be done. *Needham v. Needham*, i. 633

MOTION.

3. An order to dismiss, for want of prosecution, obtained upon notice of motion, intituled in the name of the plaintiff and three defendants (where one of the defendants had been struck out by amendment), discharged, with costs, as irregular. *Rowlatt v. Catell*, ii. 186

4. An order to file a replication within a certain time, or in default to dismiss the bill, obtained upon notice of motion on behalf of several defendants, after the death of one of such defendants, discharged with costs as irregular. *Evans v. Gwillim*, iv. 635

5. A motion which has been opened cannot be afterwards treated by the party moving as an abandoned motion; but the parties opposing are entitled to costs as on a motion refused. *Dugdale v. Johnson*, v. 92

6. Where a motion for the discharge of a prisoner is made before the Vice-Chancellor in a Rolls' cause, or in a cause attached to another branch of the Court, the Vice-Chancellor cannot (unless specially authorised) make an order on such application, although the prisoner be brought before him by habeas corpus—*semble*. *Newton v. Askeu*, vi. 321

7. Where the question of equitable assistance depends on the legal right, and the legal right is denied by the answer, the plaintiff may move for leave to try the legal right, without asking for an injunction in the meantime. *Rodgers v. Nowill*, vi. 332

8. Special leave given to the plaintiffs to move for liberty to amend their bill, by striking out the name of one such plaintiffs and making him a defendant:—*Held*, to authorise a motion by such of the parties as were to remain, excluding the plaintiff whose name was to be struck out; and the Court made the order, without prejudice to a motion then pending, for a receiver in the original cause. *Hart v. Tulk*, vi. 612

MOTION EX PARTE.

See EVIDENCE.

MOTION FOR DECREE.

See APPENDIX, vol. ix, pp. xxxi, lxxvii; vol. x, pp. xxiv, liv, lv.

MULTIFARIOUSNESS.

See APPENDIX, vol. x, p. lvi.—JOINT-STOCK COMPANY—JURISDICTION—PLEA—TRUSTEE AND CESTUI QUE TRUST.

A demurrer for multifariousness allowed, with liberty to amend the bill. The bill was amended by the addition of statements which precluded a demurrer for multifari-

NEPHEW.

ousness to the amended bill. The defendant answered, and took the objection of multifariousness by his answer. The plaintiff did not prove the additional facts stated. The Court, at the hearing, refused either to allow or reserve to a future stage of the cause the objection of multifariousness as a defence, the same not having been taken in limine to the amended bill; but decided, that regard should be had to the objection in disposing of the costs. *Benson v. Hadfield*, iv. 32

MULTIPLEPOINDING.

See JURISDICTION.

MULTIPLICITY OF SUITS.

See JURISDICTION.

MUNICIPAL CORPORATION.

See STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18.

MUTUALITY.

See AGREEMENT.

NE EXEAT REGNO.

See APPENDIX, vol. x, p. ii.

NEGLIGENCE.

See MORTGAGOR AND MORTGAGEE—NOTICE—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. Negligence, as applied to cases of constructive notice, supposes the disregard of a fact known to the purchaser, which indicated the existence of the fact the knowledge of which the Court imputes to him; and such negligence may, without a fraudulent motive, be so gross as to justify the charge of constructive notice—*semble*. *West v. Reid*, ii. 249

2. Unexplained loss of property by trustee or bailee attributed to negligence. *Brown v. Sewell*, xi. 53

NEGLIGENCE IN PERMITTING MORTGAGOR TO RETAIN THE TITLE-DEEDS.

See PRIORITY OF INCUMBRANCERS.

NEPHEW.

See LEGACY.

The description of nephews and nieces includes the child of a brother or sister of the half blood. *Grievs v. Rawley*, i. 63

NEW TRIAL.

NEW TRIAL.

See INJUNCTION.

NEW TRUSTEES.

See TRUSTEE AND CESTUI QUE TRUST.

NEXT FRIEND.

See SOLICITOR.

1. The next friend of a sole plaintiff, an infant, ought not to take proceedings in the cause in the name of such plaintiff, after the plaintiff has attained the age of twenty-one. *Brown v. Weatherhead*, iv. 122

2. The costs of the next friend of the infant to the time the infant attained twenty-one allowed, as between solicitor and client; but no costs allowed of proceedings subsequently taken without the authority of the plaintiff, although such proceedings were merely consequential on former proceedings, if the suit were to be prosecuted. *Ib.*

3. It is not necessary to name a next friend of the petitioner, on the petition of a married woman, under the stat. 2 & 3 Vict. c. 54. for access to infants in the custody of the father. *In re Margery Groom*, vii. 38

4. The Court refused to dismiss or refer to the Master for inquiry the bill of infant residuary legatees, filed by a next friend, although the estate might have been administered under a claim, or the fund protected by payment into Court under the Trustee Relief Act,—the propriety of any expenses incurred being a matter for consideration in ultimately dealing with the costs of the suit. *Smallwood v. Rutter*, ix. 24

5. The Court had regard to the exercise of the discretion of the father of the infant plaintiffs in authorising the suit,—no improper motives appearing, although the father did not contribute to the maintenance of the infants, and lived apart from his wife, by whom the infants were supported. *Ib.*

6. In the absence of any fact impeaching the solvency, conduct, or character of the next friend of the infant plaintiffs in the cause, notwithstanding he was a stranger to the family, the Court refused to refer it to the Master to inquire whether he was a proper person to be such next friend. *Ib.*

NEXT OF KIN.

See APPENDIX, vol. ix. p. xxxii.—COSTS—HEIR-AT-LAW—LEGAL REPRESENTATIVE—MALE LINE—PARTIES—POWER—TENANCY IN COMMON.

1. Bill by parties claiming as next of 534

NEXT OF KIN.

kin against executors. Report, that other persons not parties were the sole next of kin. Exceptions by the plaintiffs to the report. Objection, that the plaintiffs, before the exceptions were argued, must make parties the persons found next of kin by the Master, overruled. *Topham v. Lightbody*, iv. 312

2. The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease, upon trust to sell the real estate, and pay the money arising therefrom to such persons as the testatrix should, by any codicil, direct; and, if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin: and, by her codicil, the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees, upon the like trusts, but directed that all "the said residue" should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father:—*Held*, that the testatrix died intestate as to the residuary personal estate. *Say v. Creed*, v. 509

3. That the next of kin of the testatrix, ex parte maternâ, at the death of the tenant for life, were, under the codicil, entitled to the proceeds of the real estate. *Ib.*

4. A testator, after bequeathing his residuary estate to trustees upon trust for his grandson, the child of his deceased daughter, for his life, directed them, in case his grandson should die under twenty-one without issue, then to pay the rents and profits unto and amongst his (the testator's) "next of kin, in such proportions and manner as is provided by the Statute of Distributions." And in case the grandson should die after attaining twenty-one without leaving issue, or such issue should die under twenty-one, or unmarried, or without issue, then to distribute the whole of the residue amongst such next of kin in the same proportions and manner:—*Held*, that the gift was to the next of kin of the testator at his death, and this, notwithstanding his sole next of kin at the time of making the will, and at the time of his death, was the grandson of the testator to whom the life estate was given, and the sole next of kin of the grandson at the same time was the father of the grandson, the husband of the deceased daughter of the testator. *Bird v. Luckie*, viii. 301

5. The mere circumstance that a gift to the next of kin of a testator is not immediate, but is contingent upon a future event, which might or might not happen, is insufficient to render the description appli-

NEXT OF KIN.

cable only to such person or persons as should form the class at the time of the occurrence of the event. *Ib.*

NIECE.

See LEGACY—NEPHEW.

NOMINATION.

See TRUSTEE AND CESTUI QUE TRUST.

NOTE AT FOOT OF THE BILL.

See ANSWER.

NOTICE.

See AGREEMENT—ASSIGNMENT—CHARITABLE TRUST OR USE—HUSBAND AND WIFE—IMPROVEMENTS—JOINT STOCK COMPANY—MORTGAGOR AND MORTGAGEE—NEGLIGENCE—ORDER—PARTNERSHIP—POLICY OF ASSURANCE—PRIORITY—PRIORITY OF CHARGE—PRIORITY OF INCUMBRANCERS—PRODUCTION OF DOCUMENTS—SERVICE—SHIP—SOLICITOR—SOLICITOR AND CLIENT—SPECIFIC PERFORMANCE—STAMP—STATUTES, CONSTRUCTION OF, 7 *Ann.* c. 20; 8 & 9 *Vict.* c. 18—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER.

1. A party, before advancing money on a mortgage, inquired of the mortgagor and his wife, whether any settlement had been made upon their marriage; and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate, which was proposed as the security; and he afterwards advanced the mortgage money without having seen the settlement or known its contents:—*Held*, that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. *Jones v. Smith*, i. 43

2. Negligence may be evidence of, but it is not in law the same thing as, mala fides. *Ib.*

3. The doctrine of constructive notice applies in two cases: first, where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts and instruments, to a knowledge whereof he would have been led by due inquiry after the fact which he actually knew; and, secondly, where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it. *Ib.*

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4. It is not necessary to give notice of an equitable incumbrance to more than one of several trustees of the property, so long as the circumstances of the case remain unaltered by the death of that trustee or his ceasing to continue such trustee, or otherwise. *Meux v. Bell*, i. 73

5. On the question of notice, where there is actual knowledge, the Court will not distinguish between knowledge acquired in one character and that obtained in another. *Ib.*

6. Notice of an equitable assignment, to the trustee or one of several trustees of the property, is necessary in order to perfect the assignment, and to acquire and maintain priority. *Ib.*

7. A sale took place under a decree. The abstract stated that the person, at whose death the sale was to be made, proved the will of the testator, but it did not state the pleadings in the cause, or whether that person was living or dead:—*Held*, that this was not a sufficiently distinct intimation to the purchaser that the time of sale had, without any sufficient ground, been anticipated. *Blacklow v. Laws*, ii. 40

8. A purchaser may be presumed to have investigated every instrument which directly or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, and may only by possibility affect it—*semble*. *West v. Reid*, ii. 249

9. After the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage on the estate as a security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased to be prosecuted for upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage:—*Held*, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. *Fuller v. Benett*, ii. 394

10. During a treaty for an assignment of a lease, the plaintiff produced the lease to the defendant, and the defendant looked at

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the lease and the indorsement by which the original lessee had assigned the lease to the plaintiff, and in which it was stated that the assignment was made with the licence of the lessor. The defendant afterwards requested the plaintiff to cause the proposed assignment to be indorsed on the lease *totidem verbis* with the assignment thereon to himself. Upon a bill for specific performance, the defendant denied, by his answer, that he had seen the covenant against the assignment without licence; but the Court concluded, upon the circumstances, that the defendant had notice of that covenant. *Smith v. Capron*, vii. 189

11. A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson*, v. 734

NOTICE OF DECREE.

See APPENDIX, vol. x, p. xxvii.

NOTICE OF MOTION.

See AFFIDAVIT—MOTION—ORDER.

NOTICE OF SALE.

See MORTGAGOR AND MORTGAGEE.

NOTICE TO EQUITABLE MORTGAGEE, WHEN HE ACQUIRED THE LEGAL ESTATE, OF OBLIGATIONS OF THE MORTGAGOR AFFECTING THE PROPERTY.

See PRIORITY OF INCUMBRANCERS.

NUISANCE.

See AGREEMENT.

Injunction granted before a trial at law, to restrain the burning of bricks not then already burning in clasp, on ground within sixty yards from the plaintiff's houses, and from continuing after a certain day to burn such as were then burning,—upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the operation,—the plaintiffs undertaking to proceed with the action at the assizes about to take place, and to abide any order the Court might make as to damages to the defendant. *Pollock v. Lester*, xi. 266

OPENING BIDDINGS.

OATH.

See APPENDIX, vol. ix, p. lxxviii.

OBJECTIONS TO REPORT.

See EXCEPTIONS.

Where a report of the Master requires confirmation and further directions by the Court to give it effect, a petition in the nature of exceptions to the report cannot be heard, unless objections have been taken before the Master to the draft of the report. *Olney v. Pensam*, i. 322

OBJECTIONS TO TITLE.

See VENDOR AND PURCHASER.

OBLITERATION.

See WILL.

OCCUPATION RENT.

See TENANT IN COMMON.

Reference to fix an occupation rent, in account of arrears of dower. *Bamford v. Bamford*, v. 206

OFFER BY BILL.

See PLEADING.

OFFICE.

See JURISDICTION.

OFFICE COPY.

See AMENDMENT.

OFFICIAL ASSIGNEE.

See COSTS—INSOLVENT DEBTOR.

In suits by or against the assignees of a bankrupt, where the bankruptcy took place and the suit was instituted before the statute directing the appointment of official assignees, and no official assignee is a party to the suit,—at the hearing any of the parties are entitled to an inquiry whether an official assignee of the bankrupt's estate has been appointed. *Tatum v. Williams*, iii. 353

OPENING BIDDINGS.

See CONTRACT—COSTS—VENDOR AND PURCHASER.

ORDER.

OPINION OF COUNSEL.

See DISCOVERY.

ORDER.

See APPENDIX, vol. ix, p. lxxviii—LIEN—
MOTION.

1. An order made upon affidavit of service of the notice of motion must not depart from the terms of the notice, even though it be less extensive than the notice, if such less extensive order may be more prejudicial to the party against whom it is made than would have been the larger order which was asked. *Hutton v. Hepworth*, vi.

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2. The notice was, that the Court would be moved to dismiss an original and a supplemental cause, or to direct the original cause to be put into the paper for hearing: the order made upon affidavit of service was, that the supplemental cause should be dismissed, and the original cause put in the paper: the Court, upon motion, discharged the order. *Ib.*

3. Upon the motion of B., the Court ordered that, upon his paying the purchase-money into Court, he should be substituted as purchaser in the place of A., and that A. thereupon should be discharged from his purchase. B. having omitted to draw up the order, the plaintiffs in the cause did so, and caused a direction to be inserted for payment of the purchase-money by B. within twelve days after service of the order, in which form (after notice to B. to attend at the registrar's office) the order was passed. On the motion of B., the Court discharged the order, with costs. *Miller v. Smith*, vi. 609

4. An order made upon notice for leave to the plaintiffs to amend their bill, giving security to the Clerk of Records and Writs for the costs of the defendants of the suit already incurred, was varied *ex parte* by directing the costs of the defendants to be taxed and paid to them by the plaintiffs, reserving the question how they were ultimately to be borne, the variation not being such as could prejudice the absent defendants. *Hart v. Tulk*, vi. 611

5. An order made by the Court, and correctly drawn up, will not in all cases be discharged solely on the ground that it was passed by the Registrar without notice to the other parties in the cause. *Ib.*

ORDER AND DISPOSITION.

See JURISDICTION — PARTNERSHIP — POLICY OF ASSURANCE.

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OUTSTANDING TERM.

ORDER FOR PAYMENT OF MONEY.

See STAMP.

ORDERS OF COURSE.

See SERVICE.

ORDER PASSED AND ENTERED.

See AFFIDAVIT OF SERVICE.

ORDER TO ELECT.

See SPECIFIC PERFORMANCE.

ORDERS.

See GENERAL ORDERS.

ORNAMENTAL TIMBER.

See WASTE.

OUT OF JURISDICTION.

See JURISDICTION.

OUTFIT.

See SHIP.

OUTLAWRY.

After a plea of outlawry of the plaintiff, the outlawry was reversed, and it was held that the plaintiff was entitled to an order of the Court for the issue of a new subpoena against the defendant, and that, upon service of such subpoena, and payment of 20s. costs (as directed by Lord Clarendon's Order), the defendant should answer the bill, and that the costs of the motion must be paid by the plaintiff. *Hunter v. Nockolds*, vi. 459

OUTSTANDING TERM.

Although the Court will, by decree, restrain the setting up of an outstanding term to prevent the fair trial of a legal right, yet, after the trial of an ejectment has taken place, and a term has been set up whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside; nor will the fact, that the communications made before the trial by the party who so gained the advantage at law led the other party to believe that the substantial question of the title would be tried in the ejectment, enable him to sustain a suit for such a purpose; but if there be any impediment to the trial of the legal

OUTSTANDING TERM.

right in another action of ejectment, a suit may be sustained for relief, by removing that impediment to the trial of the right in such future action. *Master or Keeper, Fellows and Scholars of Clare Hall, v. Harding*, vi. 273

PARCELS.

See DISCOVERY.

PARISH REGISTERS.

See APPENDIX, vol. ix, p. xliii.

PARLIAMENTARY POWERS.

See JOINT-STOCK COMPANY — PUBLIC POLICY.

1. A railway company having acquired a legal right to and possession of land, and constructed their railway over the same under the provisions of their Act, another railway company, to whom the legislature had given power to purchase the same land for the purposes of their undertaking, was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers. *The Manchester, Sheffield, and Lincolnshire Railway Company v. The Great Northern Railway Company*, ix. 284

2. As to the effect of two Acts of Parliament conferring on different companies the right of purchasing compulsorily, according to the provisions of the Lands Clauses Consolidation Act, the same plot of land—*quare*. *Ib.*

3. Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits. *The Warden, &c., of Dover v. The South Eastern Railway Company*, ix. 489

PARLIAMENTARY PROVISIONS FOR MANAGEMENT.

See MORTGAGOR AND MORTGAGEE.

PAROL CONTRACT.

See AWARD.

PARTIAL EXECUTION OF A TRUST.

See APPENDIX, vol. x, p. xxii.

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See ADMINISTRATION — ADMINISTRATION SUIT—AGENT—AMENDMENT—ANSWER—APPORTIONMENT—APPENDIX, vol. ix, pp. xxxii, lxxviii; vol. x, pp. xxix, lviii—BANK OF ENGLAND—BANKRUPT—BILL OF EXCHANGE — CHURCHWARDEN — CONTRIBUTION — CORPORATION — DECREE—EVIDENCE—EXECUTOR—GENERAL ORDERS, 1841, August, r. xxx—HEIR-AT-LAW—HEARING—INFANT—INSOLVENT DEBTOR—JOINT STOCK COMPANY — JURISDICTION — MORTGAGOR AND MORTGAGEE—NEXT OF KIN—OFFICIAL ASSIGNEE—PLEADING—PRIORITY OF INCUMBRANCERS—SHIP—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 104 — SUPPLEMENTAL BILL — TENANT BY THE CURTESY—TRUST—TRUSTEE AND CESTUI QUE TRUST—VENDOR AND PURCHASER—WASTE—WITNESS.

1. To a suit for the execution of a trust, created for the benefit of the plaintiffs and other specified creditors, against the trustees (the fund having been brought into Court), the person who created the trust, or his personal representative, is a necessary party; and it is not a case in which the Court will, under the 40th Order of August 1841, make a decree saving the rights of such party when absent, although the defendants say that the trust fund is insufficient for the purposes for which it was created, and that there is, therefore, no surplus to be paid to the absent party. *Kimber v. Ensworth*, i. 293

2. *Semble*—The 40th Order of August 1841, enabling the Court to make a decree saving the rights of absent parties, does not apply to cases where the security of an absent party might be prejudiced by the decree, or where the effect of the decree might be to transfer the legal interest in property in which the absent party is equitably interested. *Ib.*

3. In a suit to administer an estate where inquiries are necessary to ascertain a class of persons beneficially interested, the general course is, to direct the inquiry as to such persons in the first instance, and not (until that inquiry is answered) to order the Master to proceed to take the accounts. It is only where the circumstances of the case are such as to satisfy the Court that the persons interested are parties to the suit, that the Court will, at the hearing, direct the Master to proceed to take the accounts, if he should find the persons interested are parties. *Baker v. Harwood; Fenwick v. Baker*, i. 327

4. An allegation that A., B., and C., were named executors, and that A. and B. proved the will, and are the personal

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representatives of the testator, may be proved by the production of the probate: and in the absence of any denial of that fact by the answers, or any averment that C. also proved, C. is not a necessary party to the suit. *Dyson v. Morris*, i. 413

5. A party named as defendant to the bill may, with the consent of the plaintiff only, appear at the hearing of the cause, and be bound by the decree, although such party has not been served with the subpoena to appear, or has not appeared in the suit; but a person who has not been named as a defendant to the bill, cannot appear at the hearing without the consent of all parties to the cause. *Ib.*

6. To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India and remains in the hands of an executor residing in England, but who was only constituted executor of the testator in India,—against such executor, a personal representative constituted in England is a necessary party. *Bond v. Graham*, i. 482

7. Two of the defendants were alleged, and in like manner admitted, to be out of the jurisdiction; but the fact was not proved: liberty was given, under the decree, to exhibit interrogatories for that purpose. *Hughes v. Eades*, i. 486

8. Under the circumstances, a party named as a trustee in articles for a settlement, but who had not acted or executed any deed of trust, was allowed to sustain a suit to carry the articles into effect. *Cook v. Fryer*, i. 498

9. The Court will neither decide a question between a class of persons and a party claiming adversely to that class, nor decree the distribution of a fund amongst a class of persons,—without evidence that all the members of such class are parties to the proceeding. *Hawkins v. Hawkins*, i. 543

10. Whether, in the case of a claim made adversely to a class of persons, the mode of proving that all the members of the class are parties, is necessarily by inquiry before the Master—*quære*. *Ib.*

11. In a suit against the trustees of real estate having the legal fee and full powers of sale,—the object being to raise a legacy charged on such estate,—the equitable tenant in tail thereof is a necessary party; and it is not sufficient to serve him with a copy of the bill, under the 23rd Order of August, 1841. *Barkley v. Lord Reay*, ii. 306

12. A person to whom a legacy, or an annuity, is given, to be paid out of the residue after the death of the legatee for life of such residue, is not a necessary party to a suit for administration of the estate,

brought by legatees of aliquot shares of the ultimate residue. *Fisk v. Norton*, ii. 381

13. Twenty creditors, interested in a real estate, are not so large a number that the Court will, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties in a suit to recover the estate against the whole body of creditors. *Harrison v. Stewardson*, ii. 530

14. That where a trust fund is to be administered under the direction of the Court, the general rule requiring the cestui que trusts to be parties is applicable to foreign trustees and cestui que trusts residing out of the jurisdiction, unless a special case of difficulty or inconvenience in the application of the rule be shewn. *Weatherby v. St. Giorgio*, ii. 624

15. The Court will not, upon the argument of the objection for want of parties, under the 30th and 39th Orders of August, 1841, order that persons beneficially interested be made parties: such order, if made, will not be made until the hearing of the cause. *Osborne v. Foreman*, ii. 656

16. Trustees appointed to sell a reversionary interest in stock, and pay off a mortgage thereon, and hold the surplus for the mortgagor, are not necessary parties to a bill of foreclosure brought by the mortgagee. *Slade v. Rigg*, iii. 35

17. An injunction to restrain a defendant from parting with the property in question in the cause may be granted, notwithstanding a principal party interested is out of the jurisdiction. *Malcolm v. Scott*, iii. 89

18. W., E., and J., mortgaged their interests under a residuary gift to B. as a security for the debt of W.; and E. and J. took a second mortgage on W.'s interest to indemnify them against the consequences of their joining in the first mortgage. Afterwards W. assigned his interest in the same property to three trustees for certain scheduled creditors. On a bill by E. and J. against B., to redeem the mortgaged property:—*Held*, that the creditors named in the schedule were necessary parties, and were not sufficiently represented by the two surviving trustees alone. *Holland v. Baker*, iii. 68

19. That the circumstance that the trustees were parties, not only in that character, but also as being themselves creditors, did not render them sufficient representatives of the absent creditors, who were fifty-four in number; and especially, inasmuch as one of the trustees had also another and distinct mortgage on the equity of redemption. *Ib.*

20. That the defect of parties was not supplied by a supplemental suit, bringing before the Court a few of the other

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creditors, to which supplemental bill the trustees were not parties. *Ib.*

21. A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpoena to appear and answer, assigned his share: the assignee was held to be a necessary party to the suit. *Humble v. Shore*, iii. 119

22. To a bill to enforce payment of a legacy charged on a real and personal estate, the heir-at-law of the survivor of the trustees appointed by the testator, and the personal representative of the testator, should properly be parties; but the defendants not having, by plea or answer, objected that such heir or personal representative were necessary parties, the Court under the 40th Order of August, 1841, in the circumstances of the case, made a decree saving their rights. *Faulkner v. Daniel*, iii. 199

23. A few of the partners in a company consisting of more than one hundred and fifty persons, held entitled to sue on behalf of the whole, to recover a debt due to the company. *Gordon v. Pym*, iii. 223

24. Case of joint liabilities, in which it is incumbent on the defendant who objects that other persons are necessary parties, to point out who are the persons he requires to be brought before the Court. *Wilson v. Goodman*, iv. 63

25. Bill, by one of several cestuis que trust against the devisee of the trustee, to set aside the sale of an estate, which was made to the trustee by all the cestuis que trust for one sum, and conveyed by one instrument:—*Held*, that all the cestuis que trust were necessary parties to the suit. *Roberts v. Tunstall*, iv. 261

26. Case where the defendants to the original bill are not necessary parties to a supplemental bill, bringing new defendants before the Court. *Parker v. Carter*, iv. 406

27. Bill by a debtor, who had conveyed property to a trustee for the benefit of his creditors, to have the trusts of the deed administered by the Court, charging that one of such creditors had forfeited his debt by a breach of his covenant not to sue or molest the debtor:—*Held*, that the creditors, parties to the deed, other than the trustee and the creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill under the 23rd Order of August, 1841. *Duncombe v. Levy*, ii. 232

28. A., having a life estate, with remainder over in strict settlement, subject to a mortgage of the settled property for a term of 1000 years, demised the property

for a term of 200 years if he should so long live. A purchaser of the term of 200 years filed his bill to redeem the termor for 1000 years, who was the first mortgagee of the estate:—*Held*, that A., the owner of the life estate subject to the term of 200 years, was a necessary party. *Hunter v. Macklew*, v. 238

29. In a suit to execute the trusts of a will devising real estates to trustees for certain persons for life, and after their decease, for sale; with power to give discharges for the proceeds and the rents and profits, and with a direction to stand possessed of the monies to arise thereby, upon trust for the children of the tenants for life, the trustees and the tenants for life being defendants—but there being no power of sale until after the death of the tenants for life, the Court, notwithstanding the 30th Order of August, 1841, directed that the children of the tenants for life should be made parties. *Cox v. Barnard*, v. 253

30. To a suit by one or more cestuis que trust against trustees, alleging that the trust fund had been invested on improper security, and seeking to have it restored, all the cestuis que trust of the fund must be parties; and if the fund be held in trust for a class of persons, there must, before the cause is heard on the question between the plaintiffs and the trustees, be evidence that all the members of the class are before the Court. *Phillipson v. Gatty*, vi. 26

31. In a suit by the devisee of a mortgagor to redeem the mortgaged estate, where the defendant, the alleged mortgagee, claims an absolute title by virtue of the Statute of Limitations, legatees whose legacies are, under the will of the mortgagor, charged on the mortgaged premises, are necessary parties. *Batchelor v. Middleton*, vi. 78

32. To a suit by three out of four residuary legatees, to recover three-fourths of a sum of stock which the executors had omitted to get in, and which had been transferred to the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party. *Hunt v. Peacock*, vi. 361

33. Where property was conveyed to four trustees for such of the creditors of a firm as should execute the deed, and twenty-six creditors (including the four trustees) executed the deed, a suit instituted seventeen years afterwards, by some of the creditors, on behalf of themselves and the others, was sustained against the trustees, they objecting that it was defective for want of the other creditors as parties. *Bateman v. Margerison*, vi. 496

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34. In a suit by some of many creditors, on behalf of themselves and the others, for an account of property which had been vested in the defendants, the trustees, for the benefit of such creditors, and one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor and supplement, against the representatives of the deceased trustee. *Ib.*

35. The author of the trust, or his personal representative, is a necessary party to such a suit; and he is not regularly or properly a party thereto by being a defendant to a bill of revivor, or revivor and supplement, against the representatives of a trustee who died after the institution of the suit, even though all the trustees are (unnecessarily) parties to such bill of revivor, or revivor and supplement; he must be made a party to the original bill, or to a bill in which the trustees are all properly defendants. *Ib.*

36. A person, not a trustee, who is a party to a breach of trust committed by a trustee, may or may not (at the option of the plaintiff, a cestui que trust) be made a defendant to a suit against the trustee in respect of such breach. *S. C.*, vi. 499

37. The Attorney-General does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate, so as to enable the Court to dispense with a legal personal representative of such person, duly constituted in the Ecclesiastical Court, as a party. *Bell v. Alexander*, vi. 543

38. In a suit between a part owner and managing owner of a ship and the mortgagees of the shares of other part owners, to determine the question of right to the freight and earnings of the ship, the same being claimed by the plaintiff towards the expenses of repairs and outfit preparatory to the voyage, and by the mortgagees as applicable, in the first instance, to the payment of their debt, the assignees of the mortgagors, the other part owners, were held to be necessary parties, and not to be entitled to their costs. *Green v. Briggs*, vi. 632

39. Persons who claim specific portions of property in the possession of another at the time of his death, are not necessary parties to a suit for administration of the estate of the deceased person. *Barker v. Rogers*, vii. 19

40. A submission by the defendant to "the judgment of the Court, whether" certain persons "ought to be made parties to the suit," may be properly set down as an objection for want of parties, under the 39th Order of August, 1841. *Ib.*

41. To a bill by the covenantor for specific performance of a covenant entered into

by a tenant in tail in remainder, to dis-entail the estate after the decease of the tenant for life, judgment-creditors of the tenant in tail, whose debts have been made charges on his estate, under the statute 1 & 2 Vict. c. 110, are not necessary parties. *Petre v. Duncombe*, vii. 145

42. In a suit by cestui que trust against the trustees of a settlement for an account, and execution of the trust, the suggestion by the defendant of a doubt whether some part of the property of which they have possessed themselves as trustees may not belong to the estate of the settlor, does not render the representative of the settlor a necessary party. *Gaunt v. Johnson*, vii. 154

43. In a suit by the heir of entail in possession, entitled under a Scotch entail to a portion of the rents of the entailed estates, the other portion of such rents being directed to be accumulated during pupilarity, and invested in lands to be conveyed to the persons taking in succession under the same entail, the substituted heirs of entail are necessary parties. *Beattie v. Johnstone*, viii. 169

44. Where one of several trustees has died, the cestui que trust may generally sue the surviving trustees for an account, without making the representatives of the deceased trustee a party, it being the duty of the surviving trustees to place the fund in a proper position, and recover from the estate of the deceased trustee any portion of the trust money that may have remained in his hands—semble. *Ib.*

45. Where, in the administration of an estate under a will, a question arises between specific or pecuniary legatees and the parties taking the residue, as to what is comprised in a gift of a specific portion of the property, the specific or pecuniary legatees are not therefore necessary parties to a suit for the administration of the estate. *Girdlestone v. Creed*, viii. 208

46. The General Orders of the 22nd of April, 1850, do not enable a plaintiff in a claim, suing for a legacy or for administration, to proceed against a surviving executor in the absence of the personal representatives of a deceased executor, where such personal representatives would have been necessary parties to a suit before those Orders were made. *Penny v. Penny*, ix. 39

47. In a creditors' suit for the recovery of a partnership debt against the assets of a deceased partner, the surviving partner is a necessary party; and the case is not within the 32nd Order of August, 1841, which enables a plaintiff to proceed against

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one or more persons severally liable. *Hills v. M^rRae*, ix. 297

48. Upon a proceeding by claim in such a case, the surviving partner is not required to be before the Court at the hearing, but may be summoned before the Master. *Ib.*

PARTIES OUT OF THE JURISDICTION.

The legatees of two-sixths of a fund, the title to which was in question, being out of the jurisdiction, the Court made the declaration of right with respect to the other four-sixth parts only. *Morley v. Rennoldson*, ii. 570

PARTITION.

See COPYHOLDS.

PARTNER.

See PLEA.

Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving and the estate of the deceased partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business in their joint lifetime—or by the amount of the agreed capital which they were respectively to supply—or by the actual amount of the capital belonging to the surviving and the estate of the deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. *Willett v. Blanford*, i. 253

PARTNERSHIP.

See BANKRUPTCY — CREDITORS — EVIDENCE—JOINT-STOCK COMPANY—LIEN — PARTIES — PLEA — PRINCIPAL AND SURETY—PRODUCTION OF DOCUMENTS — RAILWAY COMPANY — SHIP—SPECIFIC PERFORMANCE—TRUSTEE ACT, 1850.

1. Trust-funds were invested in the purchase of transferable shares in a Banking Company, in the name of one of the trustees, who executed a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the name of joint owners or *cestui que trusts*). The trustee was also a proprietor of shares in his own right in the same company, and

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made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him: he afterwards became bankrupt:—*Held*, that, having regard to the deed of association, the banking company had no lien, founded on the general relation of partnership, on the shares of a proprietor in respect of a debt owing by the proprietor to the company. *Pinkett v. Wright*, ii. 120

2. That the right which the directors of the banking company might have, under the deed of association, of withholding their approval of the transfer of shares, cannot be exercised for the purpose of previously obtaining payment of a debt due to the bank from the proprietor whose shares are proposed to be transferred. *Ib.*

3. That the equitable title of the *cestui que trusts* to the shares purchased with the trust-funds was perfected, without notice to the banking company, by the execution of the declaration of trust thereof. *Ib.*

4. That the special contract by the proprietor to assign his shares to the banking company, as a security for their advances, gave the bank a lien on the shares then standing in the name of the proprietor, of which he was the beneficial owner; and that the same were not in his order and disposition at the time of the bankruptcy:—*semble*, *Ib.*

5. The implied authority of a partner to bind his co-partners for the re-payment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; and therefore a party advancing money to one partner, knowing that it was for the latter purpose, cannot, as a matter of course, charge the other partners with the loan, unless the transaction took place with their express or actual authority. *Fisher v. Tayler*, ii. 218

6. Two partners in a firm announced their intention of adding £16,000 to their capital, by admitting one or more additional partners. W. entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of £4000 to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of such partner:—*Held*, that W. had, so far as this evidence went, notice that the loan of £4000

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was an advance, not within the implied authority of the partner obtaining it, the other partner having authorised the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to W., for the purpose of trying that question, to bring an action on the bills against the executors of the other partner. *Ib.*

7. Bill by surviving partners, against the executors of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death,—dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known, after the death of the deceased partner. *Tatam v. Williams*,

iii. 347

8. A bill for a partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed; and, therefore, where, to a bill by one partner against another, alleging that the defendant, by conducting himself in violation of the partnership contract, excluding the plaintiff, and applying the assets to his own use, sought to force the plaintiff to dissolve the partnership before the end of the term, and praying an account of the partnership transactions and a receiver, but no dissolution, the defendant answered one interrogatory, and submitting that the bill was demurrable, declined, under the 38th Order of August, 1841, to answer the remainder, — exceptions for insufficiency were allowed and sustained. *Fairthorne v. Weston*,

iii. 387

9. Articles of partnership provided, that, on the 31st of December in every year, or such other day as all the partners should agree upon, a general partnership account and rest, and a valuation and appraisement of the property and stock should be made, and signed by the partners, and, on the expiration of the partnership term, the partnership property should be realised and divided on the footing of such last annual rest; and, if any partner should die during the partnership term, his representatives should receive payment of his share of the capital and stock, as ascertained at the last annual rest, with interest thereon (in lieu of profits from that time), by instalments; and such representatives to have no right to look into the partnership books. The partnership con-

tinued for several years, but the partners did not make the annual account and rest as provided by the articles. One partner died:—*Held*, that the representatives of the deceased partner were not entitled to a sale of the partnership property, as upon a dissolution; that the rest, and not the day of the rest, was the essence of the partnership contract; and, therefore, that the representatives of the deceased partner were entitled to participate in the profits up to the time of his death; and, also, to have the account taken, by means of the partnership books, in the usual way. *Simmons v. Leonard*,

iii. 581

10. By an agreement between some of the partners in a colliery, reciting, that it was apprehended it would be competent for one partner to determine the joint interest and bring the partnership property to sale, and that the death of any partner would have that effect; and that they were desirous that their interests should be so far several, that the share of any partner should be transmissible to his representatives, and that the partnership interest should not be determined, and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property, so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them:—*Held*, that this was not an agreement by the parties that the representatives of a partner, after his death, should continue partners with the survivors, and contribute to the working of the colliery on their joint account; but was only an agreement that none of the partners or their representatives should be entitled to a sale of more than his own share of the partnership property. *Tatam v. Williams*,

iii. 347

11. A retired partner averred, by his answer to a bill for an account against the partnership, that the plaintiff had adopted his successors in the partnership as his (the plaintiff's) exclusive debtors; but stated no facts in proof of such adoption. The accounts were directed against him as well as the other partners, without prejudice to the question of whether the retired partner was or was not discharged from the debt by the acts of the plaintiff. *Benson v. Hadfield*,

iv. 32

12. The share of a deceased partner in

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the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable. *Custance v. Bradshaw*, iv. 315

13. A. deposited monies with B., C., and D., who were bankers in partnership, and received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in March, 1837, having appointed C. and another his executors. C. and D. continued the banking business in the same name until 1842, and interest was regularly paid on the notes by the firm until that time,—the payment being indorsed upon the notes, and signed by one of the partners or their clerk. In December, 1843, the executors of A. filed their bill against the executors of B. and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B.:—*Held*, that the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of the deceased partner. *Way v. Bassett*, v. 55

14. A creditor of a partnership, against whose debt the estate of a deceased partner is, in a suit directly instituted against that estate, entitled to the protection of the Statute of Limitations, cannot (on a bill against the surviving partners and the representatives of the estate of the deceased partner, alleging that the surviving partners are indebted to the deceased partner) recover his debt against the separate estate of such deceased partner, on the ground of the equity of the partners amongst themselves to enforce an adjustment of the partnership transactions; for the creditor can at the utmost only stand in the place of the surviving partners as against the estate of the deceased partner, and in such a case the surviving partners have no claim on the estate of the deceased partner. *Ib.*

15. Acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *prima facie* be considered to have been done in the character of executor. *Ib.*

16. After a dissolution of partnership by death or otherwise, the surviving or continuing partners of the firm are (in a suit against them by persons claiming to be creditors of the partnership), entitled to the protection of the Statutes of Limitation, although, as between themselves and retired partners, or the estate of deceased partners, the partnership accounts are unsettled; and the retired partners, or

the executors of a deceased partner, are in such a suit against them entitled to the like protection. *S. C.*, v. 68

17. A partnership agreement between A. and B., that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale v. Hamilton*, v. 369

18. Two solicitors having entered into partnership, each of them continued to attend to the business of his former clients, but on the partnership account; and one of the partners having proposed to invest a sum of money belonging to a client in a certain mortgage, the proposal was agreed to by the client, and the money was paid to the joint account of the partnership, at their bankers, for the purpose of the investment. The negotiations for the mortgage were broken off by the proposed mortgagor; but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been done. Although the banking account was kept in the name of the firm, the monies standing to the account belonged exclusively to the partner who committed the fraud; he alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client the partnership was dissolved; and ten years after the dissolution of the partnership, the partner who had committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. The client then filed his bill against the other partner to recover the money:—*Held*, that the defendant was originally liable to the plaintiff for the money received by the firm; that his original liability was continued as well after as before the dissolution of the partnership, by the fraudulent representations of his former partner; and that in equity the limitation in bar of the claim did not begin to run in favour of the defendant until the time when the client discovered the fraud. *Blair v. Bromley*, v. 542

19. That the fraud and misrepresentation of one of the partners entitled the

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client to relief in equity against the other, not only if the case was one in which the client might have recovered in an action at law against such other partner, but also if the remedy at law against the other partner was barred by the lapse of time. *Ib.*

20. Articles of partnership between two partners as brewers, maltsters, &c., covenanting with each other that they and their respective executors and administrators would continue partners for twenty-one years, determinable upon the death of both partners, unless their respective representatives should agree to continue the business for the residue of the term; and empowering either partner to sell his share in the partnership property (offering it first to the other partner), so that the purchaser should not be entitled to the possession of the partnership property until the expiration of the partnership, without the consent of the other partner; empowering, also, each partner, either in his lifetime or under his will, to introduce one or more relations, being sons, brothers, or nephews, into the partnership, to take all or a portion of his share, during the continuance of the partnership; and providing, that, in case of the death of either or both partners during the term, after having introduced such relation, the person so introduced should be considered as the original partner; providing, also, that in case of the death of either partner during the term, without having introduced such relation, the business should be carried on by the surviving partner and the executors, administrators, or trustees of the deceased partner; but making no provision for the case (which happened) of the death of one partner during the term, and his executors or administrators refusing to be concerned in the business with the surviving partner, and calling for an immediate dissolution, and a sale and distribution of the partnership property, the surviving partner not consenting to such dissolution or sale:—*Held*, in a suit by the executors of the deceased partner against the survivor, that the provisions in the articles for the continuance of the partnership during the term of twenty-one years could not be enforced in equity by way of specific performance of the partnership contract against the representatives of a deceased partner, either by way of relief in a suit in which such surviving partner was plaintiff, or by way of protection in a suit in which he was defendant; and, inasmuch as the articles could not be so enforced, the plaintiffs, the executors of the deceased partner, repudiating the partnership, were entitled to a decree for a dissolution; but that such relief would be given to them in equity

subject to any legal right which the surviving partner had to recover damages against the executors of the deceased partner for a breach of the covenants contained in the articles; and that the amount of any damages which might be recovered in such an action must be added to the credit side of the account of the surviving partner to be taken under the decree. *Downs v. Collins*, vi. 418

21. The option reserved to the executors of the deceased partner to enter into the partnership with a surviving partner must be accompanied by the obligation on the part of the surviving partner to admit them; and, unless the option be confined to the representatives of the partner who shall die first, the surviving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him. *S. C.*, vi. 436

22. Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, and appointed as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from ten to twenty-five per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed, that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal copartnership, and offering to allow twenty-five per cent. upon the work done separately to the partner who did it,—the Court, in the circumstances, made a decree accordingly. *Webster v. Bray*, vii. 159

23. Issues directed on the questions, whether the solicitors of a railway company were partners in the business done by them for the company; and, if partners,

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whether in equal shares. *M'Gregor v. Bainbrigge*, vii. 164, n.

24. A gift and devise by one of the partners in a cotton-mill, of all his property, estate, and effects, to trustees, upon trust, to lay out and invest two-third parts thereof upon real or good personal security, or to transfer the same, and allow it to remain in the concern, of which he was one of the co-partners, in the names of his trustees, and alter, vary, change, and transpose the same as they should think fit, and stand possessed of the same, upon trust, for the two sons of the testator, with certain powers of advancement out of their respective shares.—*Held*, to authorise the executors to continue the monies of the testator in the trade, but not to trade with the monies by becoming partners in the firm. *Travis v. Milne, Milne v. Milne*, ix. 141

25. The surviving partners of a testator dealing with the property of the testator, with the knowledge that it belongs to his estate, are bound to inquire into the trusts on which it is held, and are liable as if they had actual notice of those trusts. *Ib.*

26. A suit by parties beneficially interested in the estate of a deceased partner cannot be maintained against both his executors and surviving partners, in the absence of special circumstances; but collusion is not the only ground for such a suit; and it may be maintained where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate as against such partners. *Ib.*

27. It is not to be assumed that the annual stock-taking by a partnership truly represents the interests of the several partners in the firm; but it may, or may not do so, according to the purposes for which, and the mode in which, it is made up. *S. C.*, 153

28. If a partner in a business, in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients, the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit—*semble*. *Morison v. Moat*, ix. 241

29. Bonds executed by partners to each other, relating to their rights as partners, of the same date as the partnership deed, read with the deed as part of the partnership contract. *S. C.*, ix. 260

30. The payment of the expenses of advertisements out of partnership funds, is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisements; the partnership having had, during its continuance, the benefit of the expenditure. *S. C.*, ix. 266

31. A. and B., and the son of B., entered into partnership as solicitors, and by articles agreed (2) that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned; (5) that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships, which were then held by B., and such offices should be partnership appointments; (6) that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profits of the partnership; (15) that if B. or his son should retire, or A., or B., or his son, should die, the share of the deceased partner should accrue to the surviving partners; that if B. or his son retired, they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should not practise within thirty miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership practice, and should, on receiving monies, bills, notes, &c., knowingly or wilfully omit immediately to make entries thereof, or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect; and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequences as if it had determined by the voluntary retirement of the offending partner. B. and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt; and he absconded in January, 1849, and did not return to the business. In May, 1849, A. served a notice, in the manner pointed out by the articles, on B. and his son, to dissolve the partnership from that date; and he then filed his bill against B. and his son, to

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have the dissolution declared by the Court, an injunction to restrain them from practising within 30 miles, and a decree that they should resign the several offices or clerkships:—*Held*, that the plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner (the son of B.), and that he was not entitled to dissolve it by notice under the 16th clause without the concurrence of his co-partner (the son). *Smith v. Mules*,

ix. 556

32. That, B. not having procured or endeavoured to procure for the partnership firm the appointments to the several offices or clerkships, so as to give the plaintiff at the dissolution either a share of the profits of the offices or the chance of competing for them, but such appointments having been procured for B. and his son to the exclusion of the plaintiff, B. and his son were not to be allowed to retain the offices for their exclusive benefit. *Ib.*

33. That, inasmuch as, from the nature of the offices, they could not be sold, nor could any manager or receiver be appointed to carry them on, the defendants ought to be charged with the value of the offices in the partnership accounts. *Ib.*

34. That, the plaintiff having given a notice of dissolution (acting under the 16th clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the 15th clause. *Ib.*

35. That, the consequences of a dissolution under the 15th clause not having attached, the plaintiff, therefore, was not entitled to the injunction to restrain the defendants from practising within 30 miles. *Ib.*

36. An agreement, that, if any of several partners should not diligently and faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution—construed to refer to the diligent and faithful discharge by each partner of the portion of business carried on by him. *Ib.*

37. A designed or wilful omission to make proper entries in the partnership books must be shown, in order to establish a case of breach of the partnership articles on the ground of an omission to make such entries. *Ib.*

38. A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to Sarah his wife; and after her de-

cease, to Mary, his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of the will Mary married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—*Held*, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled under the partnership articles to such share. *Page v. Cox*, x. 163

39. A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favour of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist. *Ib.*

40. A. and B., who were partners in the business of sharebrokers, and also bought and sold shares on their own account, dissolved their partnership; and after the dissolution A. deposited with the bankers of the firm shares which the firm had contracted to buy but had not paid for, and obtained advances to pay for such shares upon the security created by the deposit, and signed an authority to the bankers, in the name of the firm, to sell the shares, if the moneys advanced were not repaid in a certain time. In a suit brought by B. against A. and the bankers, repudiating the authority of A. to make the deposit, obtain the advances, or authorise the sale:—*Held*, that, under the circumstances, A. had power, notwithstanding the dissolution, to raise money for the purpose of completing the purchase of the shares by means of the deposit, and to give the bankers authority to sell the shares in default of repayment. *Butchart v. Dresser*, x. 453

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41. Articles of partnership provided, that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner, by giving him notice thereof under their hands in the form thereby prescribed; and that, immediately after giving such notice, a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided, that, if a partner became bankrupt, insolvent, or was expelled, his interest should cease, as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The article also provided for the adjustment of the partner's accounts within sixty days after the 30th of June in each year, when an inventory of all the stocks, debts, &c., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective parties, which shares were to be carried to their respective accounts; and it was provided that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next preceding; and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement:—*Held*, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract. *Blisset v. Daniel*, x. 493

42. That such a power must be understood to exist, not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership. *Ib.*

43. That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. *Ib.*

44. That the power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners. *Ib.*

45. Two persons contracted with a railway company to execute certain works, and, after some progress had been made with the works, a judgment creditor of one of the contractors took in execution his share of the plant and effects, which the sheriff sold and assigned to the other contractor. The other contractor assigned the interest of the firm in the contract, and all the effects and monies due or to become due in respect of the same, to a third person, by way of security, with power for such assignee to enter on the works and take possession and execute the contract. The said assignee, some months afterwards, took possession of the works and proceeded to complete them. The company had notice of the execution and sale by the sheriff of the property of one contractor, and of the assignment to the other, and by the other to the said assignee; and they allowed the works to be continued by the two latter persons respectively, and made payments to them on account. The assignee having (after the insolvency of his assignor) filed his bill against the company for an account of what was due from them in respect of the contract, and for a declaration that a release executed to the company by the contractor whose share had been taken and assigned by the sheriff, was fraudulent:—*Held*, that the seizure in execution of one partner's share of the plant and effects operated as a dissolution of the partnership,—that the subsequent prosecution of the works by the other contractor, or his assignee, did not necessarily involve any new contract with the company, but was consistent with that theretofore made,—that the contractor, or his assignee, who without objection from the company prosecuted the works, could sustain a suit against the company for payment of what had become due from them

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in respect of the works done under the contract,—and that a release executed by the partner and contractor whose share of the partnership effects had been taken in execution, was void as against the other contractor and his assignee. *Aspinall v. The London and North-Western Railway Company*, xi. 325

PART OWNER.

See JURISDICTION—SHIP.

PART PAYMENT.

See ANNUITY.

PATENT.

1. Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the license of the plaintiffs, an invention, to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent. *Caldwell v. Vanvlissengen*, ix. 415

2. Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions in conformity with the law and constitution of this country; and the powers of the Court of equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects. *Ib.*

3. The Crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3) within reasonable limits, the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The stat. 21 Jac. 1, c. 3, did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures. *Ib.*

4. The prohibitory words of the patent, which are addressed only to the subjects of this country, are in aid of the grant, and not in derogation of it. *Ib.*

5. Principles upon which the Court will interfere to protect a patentee before he has established his right at law in the case of patents which have been long used or enjoyed, or will, in the case of new patents, suspend its interference until the right at law has been established. *S. C.*, ix. 424

6. Whether there might not be a case of necessary user of an invention which the

PAYMENT INTO COURT.

Court would not regard as the infringement of a patent—*quare*. *S. C.*, ix. 429

PAUPER.

See COSTS—DISPAUPERING.

PAYMENT.

See EXECUTOR—ORDER—STATUTES, CONSTRUCTION OF, 3 & 4 Will. 4, c. 27, ss. 2, 3—VENDOR AND PURCHASER.

PAYMENT INTO COURT.

See APPENDIX, vol. ix, p. lxxxi; vol. x, pp. xxx, lxiii—PLEADING—STATUTES, CONSTRUCTION OF, 4 Geo. 2, c. 28.

1. Where the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given tending to show that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the plaintiff that he should previously pay into court the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession. *Bowser v. Colby*, i. 109

2. An executor, who had proved the will in India, and, in his answer, admitted that, after payment of all the known debts, a certain balance of the estate remained in his hands, subject to other charges and expenses, the amount of which he had not ascertained, and that he had invested such balance on personal security in India,—ordered to pay the balance into court, allowing a reasonable sum to be retained in respect of the suggested deductions, by a day which would afford time for the remittance of the fund from India. *Roy v. Gibbon*, iv. 65

3. A residuary sum of stock standing in the names of trustees, the dividends of which were paid by them to the parties entitled thereto, ordered to be transferred into Court to the credit of the cause, on the application of a party entitled to a mere contingent interest in the fund, and notwithstanding that all the parties entitled to vested interests therein were satisfied with the conduct and custody of the trustees, and opposed the application. *Bartlett v. Bartlett*, iv. 631

4. It is not the practice to order the payment of money into court upon motion made after the decree in a cause and before the hearing for further directions, founded merely on admissions in the answer. *Binn v. Parr*, vii. 288

PAYMENT OUT OF COURT.

PAYMENT OUT OF COURT.

See APPENDIX, vol. ix, pp. xliii, lxxxi; vol. x, pp. xxx, lxiv—DISMISSAL—STAY OF PROCEEDINGS.

1. Where the sum to be paid out of court amounts to £11, it will not be ordered to be paid to the solicitor. *Hawkins v. Dodd*, i. 146

2. Order for payment of the dividends of a fund in court to the executors, for distribution amongst the parties interested, before the accounts of the estate were taken, the executors admitting assets of the testator for all purposes. *Shewell v. Shewell*, ii. 154

3. A legacy to a woman for life, with remainder to her children, paid out of court, on the petition of the mother and children, on their undertaking to account, if required, as the Court should direct,—the children having attained twenty-one, and the mother being sixty-six years of age. *Brown v. Pringle*, iv. 124

4. Where it appeared, upon affidavits, in an administration suit, that the estate was large, with but few debts or charges thereon, the Court ordered the jointure of the widow of the testator and annuities given by his will to be paid out of the income of the estate before decree, but refused to direct the payment of pecuniary legacies. *Digby v. Boycott*, v. 444

PAYMENT OF LEGACIES.

See ADMINISTRATION SUIT—EVIDENCE.

PECUNIARY LEGATEES.

See PARTIES.

PEDIGREE.

See NEPHEW.

PEER OF PARLIAMENT.

See JOINT STOCK COMPANY.

PENALTY.

See LIFE ASSURANCE.

The owner of a ferry obtained an Act of Parliament enabling him to build a bridge instead of a ferry, and to take tolls thereon; and enacting that any person who should evade the payment of the tolls, by conveying, or assisting to convey, passengers, &c. across the river, within the limits of the ferry, otherwise than by the bridge, should forfeit and pay 40s. for every such offence, to be recovered in a summary way before a justice of the peace, and levied under a warrant to be issued by such justice; and

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that one moiety of such penalty should be paid to the informer, and the other to the owner of the bridge; and that, where no sufficient distress was found, the offender might be committed for non-payment of such penalty; and that any party aggrieved might appeal from any order of a justice under the Act to the quarter sessions, but no order or proceedings in the execution of the Act should be removed by certiorari or any other suit or process to any court of record at Westminster. On a motion to restrain a railway company, whose terminus was within the limits of the ferry, from conveying railway passengers across the river in steam boats :—*Held*, that, although the Act which substituted the bridge for the ferry gave the owner of the bridge no right of action against persons evading the tolls, yet, if he were entitled to recover penalties against offenders under the Act *de die in diem*, the Court would protect him, by injunction, from the infringement of his right. That, as no action could be brought, under the Act, by the plaintiff, against the railway company, in respect of the alleged wrong, the Court would not simply leave the plaintiff to proceed by distress, in order that his legal right might be tried in replevin, but would direct an issue to try such right, and require the defendants not to raise any objection at law on the ground that the alleged wrong was done by a corporation. *Cory v. The Yarmouth and Norwich R. Co.*, iii. 593

PENCIL.

See AGREEMENT.

PERIOD OF DISTRIBUTION.

See CHILDREN—NEXT OF KIN—WILL.

PERPETUAL INJUNCTION.

See INJUNCTION.

PERPETUITY.

See DEVISE—POWER.

PERSONAL CHATTELS.

See DEBTOR AND CREDITOR.

PERSONAL ESTATE.

See CONVERSION.

PERSONAL REPRESENTATIVE.

See APPENDIX, vol. ix, pp. xlv, lxxii—CHARGE.

PETITION.

PETITION.

See APPENDIX, vol. x, pp. lxx, lxxi.—APPOINTMENT—CHURCHWARDEN—CONTEMPT—COSTS—NEXT FRIEND—OBJECTIONS TO REPORT—PLEADING—REHEARING—SPECIFIC PERFORMANCE—STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60, s. 2.

PIRACY.

1. The proprietor of a book, whose copyright has been invaded by the printing of a similar work, and who is entitled to an injunction to restrain the printing and sale of the unlawful work, is not, under the stat. 54 Geo. 3, c. 156, s. 4, entitled to an order for the delivery up of the illegal copies—if the book, the copyright of which has been infringed, was not composed, and entered according to the statutes, at the time the illegal copies were printed. *Colburn v. Simms*, ii. 543

2. *Semble*, there is no common law right in the author or proprietor of a book which is pirated, to the delivery up of the copies of the illegal work; and, therefore, if such relief is given in equity, it must be under the provisions of the statutes for the protection of literary property. *Ib.*

3. Whether the copies of the illegal work would in any case be ordered to be delivered up in a suit to which the person at whose expense and on whose account they had been printed was not a party—*quære*. *Ib.*

4. Principle upon which the Court gives an account of the profits of the unlawful work, in the case of piracy. *S. C.*, ii. 560

PLAINTIFF.

See ADMINISTRATION—AMENDMENT—CONDUCT OF SALE—CONTEMPT—COSTS—CREDITORS' SUIT—INFANT—INTERPLEADER—JOINT-STOCK COMPANY—MOTION—ORDER—PARTIES—SHIP—SOLICITOR—STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60—WITNESS.

1. The plaintiff brought her bill for redemption, describing herself as A. B., the widow of the mortgagor, and claiming as his devisee and executrix; but she obtained probate of the will as A. C., otherwise B., spinster:—*Held*, that, as the description of the plaintiff in the suit involved the question of her title under the will, the above variance did not entitle the defendant to have the bill taken off the file, or security given for costs. *Griffith v. Ricketts*, vii. 195

2. One of several plaintiffs having concurred in authorising a suit to be instituted, and after its institution instructing

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the solicitor for the plaintiffs not to take any further proceedings in the cause, is not, upon further proceedings being taken, entitled to an order that the solicitor shall indemnify him in respect of the subsequent costs of the suit. *Winthrop v. Murray*, vii. 172

PLAINTIFF IN CROSS SUIT OUT OF JURISDICTION.

See SECURITY FOR COSTS.

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See CONTEMPT—COSTS—OUTLAWRY.

1. To a bill for an account of the dealings and transactions of a partnership by the executors of a deceased partner, the defendant pleaded, that, for a certain consideration, an agreement (not in writing) was entered into between the testator and himself, that all accounts between them and all claims of the testator in respect of the estate, moneys, and effects of the partnership, and the debts due to and from the same should be waived:—*Held*, that the agreement should be construed to import that the defendant thereby took upon himself the discharge of the partnership liabilities, but that the plea was bad, inasmuch as it did not aver, that no such liabilities still remained to be discharged. *Brown v. Perkins*, i. 564

2. *Semble*, there is no rule that a release or a stated account are the only defences which can be set up by way of plea to a bill for an account. *Ib.*

3. A plea of no partnership to a bill for a partnership account is defective in substance, if not supported by an answer to allegations in the bill, which, if true, would establish the partnership. *Harris v. Harris*, iii. 450

4. To a bill for a partnership account by the representatives of an alleged partner against the survivor, suggesting a pretence by the defendant that no partnership existed, and charging that the defendant was in possession of documents by which the fact of the partnership alleged by the bill would appear, the defendant pleaded no partnership, and supported his plea by an answer to the alleged facts, but did not answer as to whether he was in possession of documents showing the truth of the bill:—*Held*, that the defendant, for the purpose of the argument of the plea, must be intended to admit that he had in his possession evidence which would prove the partnership; and that the plea must, therefore be overruled. *Ib.*

5. An agreement in writing for the sale of an estate by a father to his son ex-

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pressed a money consideration; but the conveyance of the estate expressed the consideration of natural love and affection. To a bill by the son for a discovery of the conveyance, a plea of the agreement in writing, and that the purchase-money had never been paid or released, was held, under the circumstances, to be defective, in not averring that the money was due. *Drake v. Drake*, iii. 523

6. Bill of discovery in aid of an action of ejectment. Plea, that the plaintiff had contracted to purchase the estate, and that the defendant had a lien on it for the unpaid purchase-money. *Semble*, that the plea is no defence to the discovery; but that the proper mode of protecting the equitable interest of the defendant is by a cross-suit for relief. *Ib.*

7. There is, on principle, no objection to a plea of multifariousness—*semble*. *Benson v. Hadfield*, iv. 32

8. A defendant, residing abroad, had obtained two orders from the Master for time "to answer," not including the expression that leave was given "to plead or demur." The defendant's solicitor, on application for a third order, produced before the Master a document which, he stated, was the draft of the answer, which answer would be filed without delay, and the Master gave two months further time. The defendant afterwards filed a plea to the bill:—*Held*, that the plea was an answer, and satisfied the terms of the Orders giving time to answer. *Hunter v. Nockolds*, vi. 12

9. A plea to a bill of revivor, by the representatives of a deceased defendant, that the party whom they represent was never served with a subpoena to appear and answer, and did not appear nor answer the original bill, overruled, as insufficient in substance, —not excluding the fact that the deceased party might by other means have been bound by the proceedings in the original cause. *Rawlins v. Moss*, vi. 604

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See ADMINISTRATION SUIT — AGENT — AMENDMENT — ANSWER — APPENDIX, vol. x, p. 56 — BANKRUPT — BANKRUPTCY — BILL — BILL OF REVIVOR — CHARITY — CO-PLAINTIFFS — COSTS — DECREE — DEMURRER — DISCOVERY — EVIDENCE — EXECUTOR DE SON TORT — FRAUD — HUSBAND AND WIFE — IMMATERIALITY — INSOLVENT DEBTOR — INTERPLEADER — JOINT-STOCK COMPANY — LUNACY — MULTIFARIOUSNESS — PARTIES — PARTNERSHIP — PLAINTIFF — PLEA — PROXIMITY — SHIP — SOLICITOR — SUPPLEMENTAL BILL — TRUST.

1. Each of two original suits to recover
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the same sum of money became defective by the insolvency of a party who was plaintiff in the first of the causes and a defendant in the second, the plaintiff in the second suit not being a party to the first suit:—*Held*, that the defect in the first suit was not remedied by a supplemental bill in the second suit, before a decree was obtained in that suit. *Cuttell v. Corral*, i. 216

2. The prayer, under the 23rd Order of August, 1841, "that the defendant, upon being served with a copy of the bill, may be bound," &c., will be required to be inserted in the prayer of process. *Gibson v. Haines*, i. 317

3. Observations on the cases in which defendants to an original bill should be made defendants to a supplemental bill. *Dyson v. Morris*, 413

4. After the trustees of a charity had put in their answer in a suit, and before the hearing, one trustee died, and another resigned. New trustees were appointed in their stead, but were not made parties to the cause before the hearing. After the cause was heard and judgment pronounced, an information was filed against the new trustees, praying the benefit of the former proceedings against them, and that they might be removed, as persons not duly qualified. The new trustees by their answer made a case to shew that the decree, if enforced, would be prejudicial to the charity, and insisted that it ought not to be made against them:—*Held*, that the new trustees came in under the founder, and not under the trustees for whom they were substituted;—that, the issue on the information was not merely whether the new trustees were bound or not by the decree:—that, having been trustees at the time of the decree, they ought to have been made parties;—that, not having been parties, they were not so bound by the former proceedings as to be precluded from making a case by way of defence to the suit; and that the statement in their answer of further facts for that purpose was therefore not impertinent. *Attorney-General v. Foster*, ii. 81

5. An averment in a bill to restrain the setting up of outstanding terms in ejectment,—that H. being or claiming to be entitled to the premises, devised them to the plaintiff, and positively averring the title of the plaintiff thereto, accompanied by statements shewing that his claim was founded upon the devise:—*Held* to be sufficiently certain upon general demurrer. *Houghton v. Reynolds*, ii. 264

6. There is no rule of pleading which requires that the facts creating the title of the plaintiff to relief must appear on the stating part or before the charging part of

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the bill; but an allegation that the defendant pretends, &c., and a general charge of the contrary of such pretences, is not an averment of the facts implied in the contrary charge. *Ib.*

7. Bill by two of the proprietors of shares in a company incorporated by Act of Parliament, on behalf of themselves and all other the proprietors of shares except the defendants, against the five directors, (three of whom had become bankrupt), and against a proprietor who was not a director, and the solicitor and architect of the company, charging the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened, and wasted; that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; that in such circumstances the proprietors had no power to take the property out of the hands of the defendants, or satisfy the liabilities or wind up the affairs of the company; praying that the defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of; and praying the appointment of a receiver to take and apply the property of the company in discharge of its liabilities, and secure the surplus: the defendants demurred:—*Held*, that, upon the facts stated, the continued existence of a board of directors de facto must be intended; that the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing board was not excluded by the allegations of the bill; that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of; that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation; and that the demurrers must be allowed. *Foss v. Harbottle*, ii. 461

8. The 49th Order of August, 1841, does not dispense with the necessity of stating, in a bill of revivor, so much of the pleadings in the original suit as is sufficient to show the title of the plaintiff, as against the defendant, to revive the suit. *Griffith v. Ricketts*, iii. 476

9. If the statements in the bill of revivor do not show a title to revive, the plaintiff cannot on demurrer supply the defect by reading the record of the original bill, although that record be referred to in the bill of revivor. *Ib.*

10. The title to revive the suit against the defendant is not shown by the mere

statement, that such defendant is the representative of a party who had answered the original bill. *Ib.*

11. The plaintiff cannot, on demurrer, sustain the bill by waving the relief prayed against the demurring defendant. *Ib.*

12. Where, consistently with the statements in a bill of revivor, the defendant might have been made a party either to receive or pay what was due to her from the estate of which she was the representative, or to account for her own receipts, but it did not appear whether she was a party for any of such purposes, or in what character she was brought before the court, her demurrer was allowed. *Ib.*

13. A general charge of fraud is to be referred to, and explained by, the particular allegations of fraud which the bill contains; but, if there be no definite or specific charge of fraud, a vague charge—where the facts alleged may or may not amount to a fraud—will not sustain the bill upon demurrer. *Munday v. Knight*, iii. 497

14. On the death of one of two partners, his executors filed a bill against the survivor, alleging that the survivor had transferred the partnership funds into his own name, and had applied, and intended to apply them in carrying on the business for his own benefit; and praying that the partnership accounts might be taken, and the interests of the parties therein ascertained. The decree, among other things, directed the partnership accounts to be taken. Before the general report was made, the defendant (the survivor of the partners) died; and the plaintiffs filed their bill of revivor and supplement against his representatives, praying the benefit of the proceedings, and that the accounts might be carried on as against the new defendants; and that the plaintiffs might be declared to be entitled, at their option, to the profits or interest on the partnership property used by the surviving partner after the death of the other:—*Held*, that the supplemental bill was in the nature of a bill of review, and, having been filed without the leave of the Court, was irregular. *Toulmin v. Copland*, iv. 41

15. That, inasmuch as the relief sought by the supplemental bill might, in substance, vary the decree in the original suit, the defendants had not, by answering the bill, precluded themselves from insisting on that objection. *Ib.*

16. That the irregularity might be corrected by ordering a stay of proceedings, without taking the bill and answer off the file. *Ib.*

17. That, although the supplemental

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bill might not of necessity have been irregular if it had excluded a period of eleven days between the death of the one partner and the filing of the bill against the other, yet the Court would not reject that period, for the purpose of sustaining the bill. *Ib.*

18. General charges or averments without force, if unsupported by a statement of particular facts, of the effect of which the Court may judge. *Hunter v. Daniel*,
iv. 432

19. The plaintiffs (who were part owners of the ship) having founded their title to relief on their rights as charterers, and stated that they were managing owners, not for the purpose of relief as managing owners, but in order to protect their rights as charterers, are not entitled to an injunction, founded merely on their right as managing owners, but can be entitled to such injunction only on the foundation of their rights as charterers. *Lidgett v. Williams*,
iv. 464

20. In a suit by a legatee claiming several legacies under the will and codicils of the testator, against the executor, naming as a defendant another legatee, who under one construction of a bequest would be entitled to an interest in one of the legacies claimed by the plaintiffs, the plaintiffs alleged by their bill that the other legatee so named as a defendant was out of the jurisdiction, but did not prove it; and upon motions ex parte, supported by affidavits, that such other legatee could not be found to be served with process, obtained leave to file a replication, and afterwards to set down the cause against the defendants who had appeared and answered. At the hearing, the absence of the other legatee was urged by the executor as a preliminary objection to the hearing of the cause; but the Court heard the cause upon the questions of construction on the bequests in which the absent legatee was not interested, and reserved the consideration of the question as to the bequest, in which it was suggested that the absent party had an interest, directing that legacy to be brought into court, and also directing an inquiry before the Master, whether the absent party was out of the jurisdiction. *Mores v. Mores*,
vi. 125

21. The proper form of proceeding to recover stock and dividends, unclaimed for ten years, and carried over to the account of the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, is, by petition to be served upon the Attorney-General and the Commissioners, and not by bill in the first instance; and if there be conflicting claims to the fund, the Court will then give direc-

tions for the trial of the rights of the parties between themselves, either by suit or otherwise. *Hunt v. Peacock*,
vi. 361

22. A defendant may state in his answer, and take issue upon, matters which happened after the bill was filed; but the Court will not deal with the subject of the suit by interlocutory order founded upon matters which occur after the answer has been filed, and are not brought forward by amendment, by supplemental bill, or by supplemental answer. *Stamps v. The Birmingham, Wolverhampton, and Stour Valley Railway Company*,
vii. 258

23. A mortgagee contesting by his bill the right of a solicitor of the mortgagor to a lien upon documents relating to the mortgaged property, in priority to his (the plaintiff's) charge, but offering, in case such prior lien should be established, to pay the amount due in respect of the same, is not bound by such offer to redeem the documents to which the solicitor's lien extends, but may abandon his right to the documents and take such a decree as his position of mortgagee entitles him to, in priority to the lien of the solicitor. *Pelly v. Wathen*,
vii. 351

24. *Quære*, whether, and in what cases, a plaintiff, who has by the bill gratuitously offered to submit to certain terms on his part, may, at or after the hearing of the cause, withdraw such offer, and still obtain relief in the suit. *S. C.*,
vii. 371

25. To a bill filed by the heir to set aside a purchase from his ancestor, on the ground of fraud, stating, also, that the purchase-money, or alleged consideration, was not paid,—the personal representative of the ancestor, having an interest in the question whether the contract is valid or not, is a necessary party: and if such personal representative be brought before the Court by supplemental bill, the original defendant should be made a party to such supplemental bill. *Wilkinson v. Fowkes*, ix. 193

26. A bill by a legatee, claiming under the will of another legatee, who took under the will of the original testator, bringing forward various claims against the representatives of the original testator and the representatives of the first and second legatee, may be multifarious, although all the claims are in some manner derived from, or connected with, the estate of the original testator. *Cowman v. Harrison*,
x. 234

27. The Court will not refuse relief to a plaintiff, merely on the ground that he has superadded to the circumstances of the case which would entitle him to relief, allegations of fraud which are not established. *Espey v. Lake*,
x. 260

POLICY OF ASSURANCE.

POLICY OF ASSURANCE.

See AGREEMENT—FORECLOSURE—INTERPLEADER—MORTGAGE—VOLUNTARY ASSIGNMENT.

1. In 1816, D. assigned a policy of assurance on his life to a trustee to secure a sum of money owing to W.; and soon afterwards, the solicitor of W. caused a memorandum to be entered in the office of the assurance company, directing that all letters were to be sent to such solicitor; and the premiums were thenceforth paid by W., through the hands of such solicitor; but the assurance company were not informed on whose behalf the solicitor acted. In 1826, D. became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by W., through his solicitor, during his life, and by the executors of W., through their bankers, after his death. D. died in 1839:—*Held*, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the assurance office of the assignment of the policy to take it out of such order and disposition. *West v. Reid*, ii. 249

2. That the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy. *Ib.*

3. That the executors of W. had a lien on the policy for the amount of the premiums which had been paid by W. and his estate, and the interest thereon; and that they were entitled to payment of the amount thereof out of the monies payable under the policy. *Ib.*

4. A debtor and his wife joined in an assignment of the chose in action of the wife to a creditor of the husband, to secure £300 owing by the husband. The creditor afterwards insured the life of the wife in a sum of £200. The chose in action was not reduced into possession in the lifetime of the wife. The wife died, and the creditor received from the assurance office the £200:—*Held*, in a suit for redemption, that, if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum assured towards the payment of his debt; that here the creditor had such insurable interest, but the risk ceased at the death of the wife; and that the money afterwards paid by the assurance office, being paid in their own wrong, the debtor was not entitled to have it applied in reduction of his debt. *Henson v. Blackwell*, iv. 434

POOR'S RATE.

See TITHES.

PORTION.

PORTION.

See ACCUMULATION—SATISFACTION—TIME FOR RAISING.

1. By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided, that if the husband should, during his life advance or pay any monies for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, monies, goods, or chattels, should descend or come by or from him unto or for the benefit of any such child, then such monies, goods, and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary:—*Held*, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband; and that the lands, tenements, monies, goods, or chattels, in the second part of the clause, should be confined to matters not perfected or not having effect until after his death. *Douglas v. Willes*, vii. 318

2. That property which, during the coverture, accrued to the husband and wife in right of the wife, and by a settlement, to which the husband and wife were parties, was settled upon them for their lives, with remainder to their children, as they or the survivor of them should appoint, (but which was not otherwise received or reduced into possession by the husband,) was not property to be accounted for, as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it. *Ib.*

3. That the value of a leasehold house, assigned by the husband in his lifetime to one of the children of the marriage, for his more comfortable maintenance and support, did not affect the share of such child of the trust fund. *Ib.*

4. That an advance by the husband in his lifetime to one of his daughters, of a sum of money, for the purpose of apprenticing her son,—the share of such daughter of the trust fund having been settled upon herself and her husband, with remainder to her children,—did not affect the share of such daughter of the trust fund. *Ib.*

5. Payments or advances to children out of an estate, other than that from which they derive portions, are not to be taken as made in or towards satisfaction of such portions. *S. C.*, vii. 328

POSSESSION.

POSSESSION.

See CONSTRUCTION—DEBTOR AND CREDITOR—JURISDICTION—MORTGAGOR AND MORTGAGEE—RECEIVER—SPECIFIC PERFORMANCE—TENANCY BY THE CURTESY—TENANCY IN COMMON—VENDOR AND PURCHASER.

POSSESSORY TITLE.

One, after occupying a house for several years, as tenant from year to year, found no one to receive the rent for fifteen years before his death, and devised the premises (with power of sale under such conditions as might be thought expedient) for the benefit of his wife and children. His eldest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow died; and it was *held*, that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the premises adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold and distributed according to the directions of the testator. *Hawksbee v. Hawksbee*, xi. 230

POUNDAGE.

See GENERAL ORDERS, 1796, April 23.

POVERTY.

See LAPSE OF TIME.

POWER.

See ABSOLUTE INTEREST—APPOINTMENT—INVESTMENT—SALE AND EXCHANGE—STATUTES, CONSTRUCTION OF, 7 Will. 4 § 1 Vict. c. 26—TENANT FOR LIFE AND REMAINDERMAN—TRUSTEE—TRUSTEE AND CESTUI QUE TRUST.

1. A married woman having a power to appoint a sum of money by will, or by any writing in the nature thereof, signed, sealed, and published in the presence of two witnesses, by her will, made in 1837, and signed in the presence of two witnesses, but not sealed, assumed to appoint the sum in question, and other property, and nominated an executor, who proved her will in the diocesan court. The husband survived the wife, and after his death, his representative obtained letters of administration of the estate of the wife from the Prerogative Court, and procured the diocesan court to recall the grant of probate to the executor of the wife, so far as related to the sum in question. In a suit by the appointee of the wife, against the representative of the husband

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and the trustees of the fund:—*Held*, that the Court could not treat the probate of the diocesan court, which excluded from the grant the sum in question, as probate of a testamentary instrument executing the power; and that a probate sufficient to cover the sum in question was necessary, in order to enable the party claiming under the appointment to sustain the suit. *Goldsworthy v. Crossley*, iv. 140

2. Whether, in such a case, if the party claiming under the appointment, by appealing from the court of probate, had shown that the probate had been refused by the court of ultimate jurisdiction in such causes, upon principles not recognised in this Court, this Court would consider the question of the execution of the power independently of the probate—*quære*. *Ib.*

3. Devise of real estates to trustees for a term of twenty-one years, and subject thereto and to the trusts thereof, to A. for life, with liberty to cut timber, &c., for buildings and repairs only; remainder to B. for life, with like liberty, &c.; remainder to the sons of B. successively in tail; and, after like remainders to C. and D. and their sons respectively, remainder to E. for life, with like liberty, &c.; remainder to the sons of E. successively in tail, with divers remainders over; remainder to the testator's own right heirs; with the declaration that the trustees of the term should receive the rents and profits of the estates, cut, fell, and sell the timber at mature growth, in due succession, and yearly (until the testator's debts and pecuniary legacies should be paid) thereout pay—1. A certain annuity and also a yearly rent-charge of £1,000 to the person entitled to the estates expectant on the determination of the term; 2. The expenses of the trust; 3. His funeral expenses; and, 4. The pecuniary legacies and annuities given by his will, or so much as his personal estate should not pay. And after such payment, or the raising of a fund sufficient for the same, to permit the person entitled to the estates expectant on the term, to enter into possession thereof, subject to such annuities as should then remain charged, and the term then to cease. The testator empowered the tenants for life, and the respective devisees in possession, to exchange part of the devised lands for others of greater or equal value, and authorised his executors to preserve the wood, so as to continue a succession in the falls thereof; and he empowered them, during and after the term, until some person was entitled to the estates in tail or for some greater estate, to enter and cut timber at mature growth for sale, and to apply the proceeds in payment of his funeral ex-

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penses, debts, and legacies, until the trusts of the term should be satisfied; and then, with the consent of the devisees in possession, to invest the surplus in the purchase of other lands in fee, to be settled to the same uses as the devised estates. The testator died in 1803. The personal estate sufficed to pay his debts and pecuniary legacies, but not to provide for the annuities. B., then the first tenant for life, on the death of the testator, entered into possession of the estates, and so continued during his life. B. died in 1837, without issue, whereupon E., the next surviving tenant for life, entered into possession. In a suit instituted in 1842, by the first son of E., as tenant in tail expectant on the decease of E. against the representatives of the trustees and the executors of B., the deceased tenant for life:—*Held*, that the tenant in tail expectant on the decease of E., was not entitled to an account of the timber felled during the life of B., the power attempted to be given to the trustees being void under the rule against perpetuities; nor to an account of the timber during the period to which the power might have lawfully extended, as such power had not been apportioned; nor to an account in this Court, as against the estate of B. or of the trustees of any timber cut during the lifetime of B.—the right of the plaintiff (if any) being a legal right, and the defendants being entitled to the protection of the Statutes of Limitation. And that the plaintiff, as such tenant in tail expectant, was not entitled to relief in equity, on the ground that the exchange effected by B., of certain of the devised estates for other estates, was not a due exercise of the power of exchange; for, if the exchange was not warranted by the power, the legal estate in the devised premises did not pass by the conveyance. *Ferrand v. Wilson*,
iv. 344

4. On the settled estates being cleared of all charges except the annuities, the party entitled to the possession subject to the term would be entitled to the beneficial enjoyment during the residue of the term, keeping down the annuities; and the term would still be available for the annuitants in enforcing payment of the annuities. *S. C.*,
iv. 368

5. Treating the authority to cut timber as imperative, and the timber cut as annual rents and profits of the estate, the power amounts to what might be a trust for the investment of the rents and profits in perpetuity. *S. C.*,
iv. 373

6. If the power of the trustees to cut timber for the purposes of settlement be permissive only, and not imperative, it is at least concurrent with the right of the

infant tenant in tail to the timber, and, to the extent in which it derogates from that right, it is liable to the objection of creating a perpetuity. *S. C.*,
iv. 376

7. Timber on an estate in strict settlement, if regarded as part of the inheritance, is yet not preserved from alienation during the infancy of the tenant in tail; and the settlor cannot superadd to the tenancy in tail a provision which would render the timber inalienable during such infancy. *S. C.*,
iv. 374

8. Whether a power not to effect a single act at a period too remote, but to do successive acts from time to time, each being *pro tanto* an exact fulfilment of the intention of the testator, may not be apportioned and sustained, so far as its operation in each case does not invade the rule against perpetuities, and held void only from the time that it would begin to infringe that rule—*quare S. C.*,
iv. 377

9. A trust term, created by a marriage settlement, to raise £1,000 on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to pay the same to such person or persons as the wife, "at any time or times thereafter during her coverture," should by deed or will appoint; and in default of appointment, to the executors, administrators, and assigns of the wife's mother. There was no issue of the marriage, and the wife survived the husband, without having exercised her power of appointment during the first coverture. She afterwards married a second time, and had issue by her second husband, and died leaving such issue, her second husband, and her mother surviving. The mother afterwards bequeathed her residuary estate and died:—*Held*, that the power given by the settlement to appoint the £1,000 could not be exercised during the widowhood of the donee, or during any other than the first coverture. *Morris v. Howes*,
iv. 599

10. That the executors of the mother were entitled to take the £1000 and interest as part of her residuary personal estate. *Ib.*

11. A power contained in a settlement of real estate on trust for sale enabled one of the parties, his executors, administrators, and assigns, on a vacancy, to appoint a new trustee. The party so empowered died, having by his will named three executors, one of whom renounced probate; and the vacancy in the trust having occurred, it was held, that the two acting executors had power to appoint the new trustee. *Earl Granville v. M^cNeile*,
vii. 156

12. Bequest of the testator's property to his wife to bring up and educate his child-

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ren. and, when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance: and, at her death, the property remaining to be equally divided amongst his children: with a gift to trustees for the children in case of the marriage of his widow:—*Held*, that the widow took a life-interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren: and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley v. Kennerley*, x. 160

13. A devise of real and personal estate to trustees, with a direction for sale with all convenient speed and within five years, and to apply the proceeds in payment of debts and legacies, and invest the residue upon trusts for the widow and children of the testator:—*Held*, to empower the trustees to sell after the five years had elapsed. *Pearce v. Gardner*, x. 287

14. In a marriage settlement, the intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees, upon the trusts thereby declared, for herself, the husband, and the children of the marriage. After the marriage, her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of £1000, and an annuity of £100 for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—*Held*, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement; and that property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement. *Ewart v. Ewart*, xi. 276

15. That the appointment by the wife was a valid exercise of the power contained in her father's will. *Ib.*

16. That upon the appointment by the wife of the £1000 for her own absolute use, that sum became bound by the trusts of the settlement; and the power of revocation was ineffectual. *Ib.*

17. That the interest in the annuity of £100 for her own life for her separate use,

POWER OF SALE.

which the wife took under her appointment (an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired), was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted, or taken otherwise than in the state in which it should be so acquired. *Ib.*

POWER OF APPOINTMENT.

See HUSBAND AND WIFE—JOINT TENANCY—RECTIFYING SETTLEMENT.

POWER OF ARBITRATORS.

See AWARD.

POWER OF COMMISSIONERS FOR INCLOSURE.

See ACT OF PARLIAMENT.

POWER OF EXCHANGE.

See POWER.

The exercise of a power of exchange for lands of equal value, by a tenant for life in possession, and having the legal estate, cannot in equity be questioned on the ground of inadequacy of value by the tenant in tail in remainder expectant on an existing tenancy for life; the question of the due exercise of the power is legal; for, if the value of the lands taken was inadequate, no estate passed at law by the conveyance. *Ferrand v. Wilson*, iv. 385

POWER OF SALE.

See MORTGAGE—TRUSTEE AND CESTUI QUE TRUST.

1. A power of sale given without restriction to a party having a limited interest only, may well be held to import a negative upon the power by the same party to buy, for the power to sell is in the nature of a trust; but as the rule does not extend to prevent, in all cases, a party having a power to sell from becoming the purchaser; so neither, where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must, in each case, depend upon the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. *Beadca v. King*, ix. 519

POWER OF SALE.

2. In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished. *Ib.*

POWER TO APPOINT NEW TRUSTEES.

See CONSTRUCTION.

POWER TO CONTINUE A FARMING BUSINESS.

See ELECTION.

PRACTICE.

See APPENDICES, vols. ix and x, which contain, according to an Alphabetical Arrangement, the Cases under the New Practice; and see also ABATEMENT, AFFIDAVIT, AMENDMENT, ANSWER, BILL, and other proper Titles.

PRECATORY GIFT.

See ABSOLUTE INTEREST.

PRELIMINARY INQUIRIES.

1. The plaintiffs, claiming to be next of kin of the testatrix, filed their bill against the executors in respect of legacies which had failed: the executors answered, but did not admit that the plaintiffs were such next of kin: the plaintiffs moved, under the 5th Order of the 9th of May, 1839, for a reference to inquire who were the next of kin of the testatrix: motion refused. *Topham v. Lightbody*, i. 289

2. A preliminary inquiry may be directed, under the 5th Order of the 9th of May, 1839, where the evidence upon the answer is a sufficient foundation for the order, but not where, if the cause were heard upon that evidence, the bill would be dismissed. *Ib.*

3. Motion under the 5th Order of the 9th of May, 1839, for special accounts and inquiries, not merely preliminary to the decision, at the hearing, of the questions in the cause, but involving the decision of some of those questions, refused. *Curd v. Curd*, ii. 116

4. Motion for inquiries, as preliminary, under the 5th Order of the 9th of May, 1839, refused, where the necessity of the inquiries would depend upon a certain effect being given to a will of difficult construction. *Breeze v. English*, ii. 118

5. Order for preliminary inquiries, under the 5th Order of the 9th of May, 1839, refused, where some of the defendants, suggested to be out of the jurisdiction, had not appeared. *Barrett v. Buck*, ii. 520

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PRINCIPAL AND AGENT.

6. The Court refused to direct preliminary inquiries, under the 5th Order of the 9th of May, 1839, in a creditors' suit, where the plaintiff was both creditor and administrator of the intestate, and the bill was filed against the heir-at-law, and sought to charge the real estate with the debts which the personal estate was insufficient to pay. *Leaden v. Lewin*, iv. 634

7. The plaintiff, under a will, claimed a fund over which the testatrix had a power of appointment, and which was subject to a gift over, in default of appointment, to the children of the donor of the power. The trustees did not admit that the will was an effectual appointment:—*Held*, that, although the plaintiff's title was not admitted, it was a case in which the persons entitled in default of appointment were necessary parties, and where the Court would therefore, under the Order v. of the 9th of May, 1839, direct preliminary inquiries to ascertain who were such persons. *Johns v. Dickinson*, v. 180

PREMIUMS.

See LIFE ASSURANCE.

PRESBYTERIAN CHURCH.

See TRUSTEE AND CESTUI QUE TRUST.

PRESBYTERIANS.

See TRUSTEE AND CESTUI QUE TRUST.

PRESENTMENT.

See PROMISSORY NOTE.

PRESUMPTION.

See LEGACY—MISTAKE.

PRESUMPTIVE SHARES.

See CHILDREN.

PRINCIPAL AND AGENT.

See ACCOUNT — BROKER — EXECUTOR DE SON TORT—SPECIFIC CHATTELS.

1. A banking company, who were mortgagees of certain Spanish bonds, employed the defendant to raise money upon them by deposit in his own name: the party with whom the defendant deposited them called on the defendant for repayment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the company, and paid the balance of the proceeds to the defendant. The company was afterwards compelled by their mortgagor to replace the bonds or their value:—*Held*, that the defendant was an-

PRINCIPAL AND AGENT.

swerable to the company for the market price of the bonds at the time of the actual sale, and that he was not answerable for the value of the bonds at any other time.

Gordon v. Pym, iii. 223

2. The agent employed by a miner, in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds and fixing the rents and duties in respect thereof,—is not therefore the agent of the miner for the purpose of making a contract with the commissioners not within the powers which had been conferred upon them in that character. *Attorney-General v. Jackson*, v. 365

3. Under an agreement between a shipper of goods and a factor, through whom the goods were sold in a foreign country, the factor gave his acceptances to the shipper for a proportionate part of the value of the goods, for the payment of which acceptances, if not satisfied by the proceeds of the goods, the shipper was to provide:—*Held*, that, on his failure to do so, and on the payment of the acceptances by the factor, the shipper of the goods became debtor in account to the factor for the amount paid by the latter; and that the remedy of the factor was not merely in damages. *Graham v. Ackroyd*, x. 192

4. Where a factor makes advances, he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a *del credere* commission, except that, when the factor, having a *del credere* commission, has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission. *Ib.*

PRINCIPAL AND SURETY.

See EQUITABLE SET-OFF.

1. A creditor took, as a security for his debt, bills of exchange drawn and indorsed by a surety, and accepted by the principal debtor. After those bills were dishonoured, the creditor drew accommodation bills on, and which were accepted by, the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety, to restrain an action subsequently brought against him on the bills which had been dishonoured, the Court allowed the action to proceed, but stayed execution. *Mackintosh v. Wyatt*, vi. 562

2. Whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor and the principal debtor—

Ib.
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PRINCIPAL AND SURETY.

3. Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honour, and any advances they might make to the same customer, within a certain time: it was *held*, that the guarantee ceased upon the death of one of the partners in the bank, before the expiration of the time to which the guarantee was expressed to extend. *Holland v. Teed*, vii. 50

4. That bills accepted before the death of the partner, and payable afterwards, were within the guarantee. *Ib.*

5. That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the death of the partner, although such amount might be diminished by such act. *Ib.*

6. That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the bank, was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. *Ib.*

7. The case in which a surety has a right to sue his principal in equity to be discharged from his liability, is where the creditor has a right to sue his debtor, and refuses to exercise that right—*semble*. *Padwick v. Stanley*, ix. 627

8. In a suit by A. against B. and C., a conveyance of an estate by A. to B. was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by B. to D., to secure a sum of money lent by D. to B., and for which C. had joined B. as his surety in a bond and covenant to D.; and the decree also directed B. to redeem the estate and procure its reconveyance to A., and, if he did not do so, gave A. the right to redeem, and to use the name of B. for that purpose, and to recover from B. the money which A. should pay to D. for such reconveyance; and the bill was dismissed against C.; A. afterwards procured an assignment of D.'s mortgage to a trustee, and in the name of the mortgagees brought an action against C. on his covenant and bond:—*Held*, that, if A. had redeemed D., the debt would have gone as against C.; that C., as the surety of B., would, on payment of the mortgage debt, be entitled to the benefit of the security held by D., such security not having been disturbed by the decree; that the charge of participation by C. in the fraud, whereby B. had been enabled to create the mortgage on the estate, was not a ground for depriving C. of such right;

PRINCIPAL AND SURETY.

and that C. was, therefore, in a suit for an injunction to restrain A. from suing him on the bond and covenant, entitled to such relief. *Yonge v. Reynell*, ix. 809

9. The circumstance of the dismissal, as against C., of the bill brought by A. against B. and C., which prayed that the mortgage debt might be paid by B. and C., was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C. to pay the debt, though C. might have no equity to be relieved from his legal liability to pay it. *Ib.*

10. The right of a surety to the benefit of the security held by the creditor, is derived from the obligation of the principal debtor to indemnify his surety—*semble. Ib.*

11. The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor, from that in which he stood at the time of the contract; and it, therefore, entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract; it also entitles the surety, at any time, to require that the creditor shall enforce against the principal debtor not only all his remedies, and all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the surety requires him to proceed. And as a person paying off a debt for which he is liable, is entitled, in equity, to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt; so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit, not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship, which requires the creditor to retain, for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor, who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby, either wholly or pro tanto, release the surety. *Newton v. Chorlton*, x. 646

PRINTED BILLS.

See APPENDIX, vol. ix, p. lxxxiii.
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PRIORITY OF INCUMBRANCERS.

PRIORITY.

See NOTICE.

Inquiry by a puisne incumbrancer on an equitable interest is immaterial, where none of the trustees of the property, at the time, knew of the prior incumbrance, and where the result of the inquiry would not, therefore, have affected the conduct of the puisne incumbrancer. *Meuz v. Bell*, i. 73

PRIORITY OF CHARGE.

1. A testatrix, entitled, upon the decease of a tenant for life, to a sum of stock standing in the names of D. and L., as trustees, bequeathed such stock to P. and appointed D. her sole executor. In 1834, after the death of the testatrix, P. assigned all his estate and effects to L. and H., upon trust for his creditors. In 1838, P. assigned his interest in the stock to the plaintiff by way of mortgage; and the plaintiff thereupon gave D. notice of the incumbrance. No notice of the assignment of 1834 was given to D. until 1843:—*Held*, that, until D., the executor, had assented to the legacy to P., the notice to L. of the deed of 1834 was insufficient to exclude a subsequent incumbrancer from obtaining priority; and that the notice of the incumbrance of 1838, given to D. by the plaintiff, entitled the plaintiff to the prior charge on the fund. *Holt v. Dewell*, iv. 446

2. That a suit instituted by some of the creditors under the deed of 1834, to execute the trusts of such deed, as it did not give the plaintiff or the executor actual, so neither could it be held to give them constructive notice of that instrument. *Ib.*

PRIORITY OF CONTRACT.

See VENDOR AND PURCHASER.

PRIORITY OF INCUMBRANCERS.

See INSOLVENT DEBTOR—SHIP.

1. A first mortgage of real estate was made to A. in fee. A second mortgage was then made to B. of the same estate, together with other real estate, by a release and conveyance of the respective premises to C., as a trustee for B., with power of sale. B. afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advance to A. or C. Subsequently, C. (after inquiry of A. whether he had notice of any incumbrance other than his own, and that of which C. was a trustee for B.) advanced a further sum to the mortgagor on the same security, and gave notice of

PRIORITY OF INCUMBRANCERS.

his mortgage to A. :—*Held*, that the several mortgages took effect, with regard to the different estates, according to the order of time at which they were respectively created; and that their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested. *Wilmot v. Pike*, v. 14

2. That the doctrine of notice, applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land. *Ib.*

3. Four trustees sell out stock, under an agreement that the proceeds shall be lent to two of them, upon equitable mortgage, by deposit of the documents of title of a copyhold estate which belonged to such two trustees in undivided moieties. The money was lent, and the documents deposited; but afterwards, by some unexplained means, they came into the hands of one of the two trustees who had borrowed the fund, and that trustee made a second equitable mortgage on his own moiety of the estate, by depositing the documents with a third person, who took them without notice of the first mortgage; that trustee afterwards became bankrupt, and the second equitable mortgagee purchased and obtained from the assignees of the bankrupt a surrender, and was admitted tenant of the bankrupt's undivided moiety, having, at the time of such purchase of the legal estate, received constructive notice of the first mortgage. In a suit by one of the trustees (the lender of the trust fund, the other having become bankrupt) for foreclosure :—*Held*, that the second equitable mortgagee, who had taken the legal estate with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had originally taken his mortgage security without notice. *Allen v. Knight*, v. 272

4. That, in the absence of any suggestion of a specific case, as against the plaintiff, charging him with acts whereby the mortgagor was enabled to commit the fraud, the mere fact of the possession of the title-deeds by the mortgagor was not sufficient to postpone the claim of the first mortgagee. *Ib.*

5. That the fact of the loan of the proceeds of the stock having been a breach of trust did not affect the question as between the first and second mortgagees. *Ib.*

6. That the cestui que trusts of the stock, not having been parties to or adopted the mortgage, were not necessary parties to the suit for foreclosure. *Ib.*

7. P. being indebted to B. makes a

PRIVILEGE.

mortgage of an equity of redemption of real estate to B. for the purpose of securing the debt, and, by the indenture of mortgage, it was falsely recited that the mortgaged estate was subject to an equitable charge for monies due to J., secured by the deposit of a deed. P. retained the deed in his own possession, and subsequently deposited it with J. as a security for money partly lent to P. by J. before, and partly after, the mortgage of the estate to B. J., at the time of the deposit, had no notice of the prior mortgage to B. :—*Held*, that inasmuch as an actual prior charge on the estate, if afterwards paid off by P., or otherwise avoided, would have left B. in the position of the first mortgagee of the equity of redemption, the recital of a charge which had, in fact, no existence, could not have the effect of postponing B. *Frazer v. Jones*, v. 475

8. That the interest acquired by J. by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption, subject to the mortgage to B.; and that B. in a suit for that purpose was entitled, as against J., to the ordinary decree for payment or for foreclosure, and delivery up of the deed on default. *Ib.*

9. Notice of a charge to an indefinite amount, although the notice be inaccurate as to the particulars or extent of the charge, is sufficient to put upon inquiry a party dealing for the property subject to the charge; and if the actual charge afterwards appears to be incorrectly described in the notice, it is nevertheless sufficient as a ground for giving priority for the true amount of the charge, as against the party who received the incorrect notice, but made no inquiry. *Gibson v. Ingo*, vi. 124

PRISONER.

See MOTION — PRIVILEGE — STATUTES, CONSTRUCTION OF, 1 Will. 4, c. 36, s. 15, r. 5.

1. A prisoner, who, having been placed in custody by a lawful attachment, has remained in prison voluntarily without claiming his discharge after he was entitled to be discharged, may be regularly detained under another attachment lawfully issuing against him. *Woodward v. Conebeer*, i. 296

2. A defendant, in custody for not answering, and brought up to have the bill taken pro confesso against him, within the time limited by the statute 1 Will. 4, c. 36, s. 15, rule 13, asked for time to put in his answer, and three weeks was thereupon given him, with liberty to apply for his discharge upon having answered. The

PRISONER.

time fixed by the same rule of the statute for retaining a defendant in custody, without obtaining the order for taking the bill pro confesso, expired during the three weeks: no answer was put in:—*Held*, that, in such circumstances, the defendant was not entitled to his discharge under the 13th rule of the statute, but was remitted to the situation he would have been in if that provision of the statute had not existed. *S. C.*, ii. 506

PRIVILEGE.

A party in a cause, who is interested in a decree which has been pronounced, is privileged from arrest in attending the Registrar's office, on passing the minutes of the decree. *Newton v. Askeu*, vi. 319

PRIVILEGED COMMUNICATION.

See DISCOVERY—PRODUCTION OF DOCUMENTS.

1. The reasons of the rule which protects from disclosure communications made in professional confidence, apply in cases of conflict between the client or those claiming under him and third persons, but do not apply in cases of testamentary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the executors as against the next of kin, but following the legal interest is subject to the trusts and incidents to which the legal interest is subject. *Russell v. Jackson*, ix. 387

2. On a bill by the next of kin of a deceased party against his executors, who were his residuary devisees and legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the solicitor of the testator, who was also, after the death of the testator, the solicitor of the defendants, the executors, was examined as a witness for the plaintiff. On a motion by the defendants to suppress the depositions of the solicitor, on the ground of professional confidence:—*Held*, that the communications between the testator and the solicitor might be read; and that the communications between the defendants, the executors, and the solicitor, after the death of the testator, were privileged. *Ib.*

3. A privilege given for the protection of the client cannot have the effect of excluding evidence of a trust which he had intended to create, and thus defeat a claim by the parties who accepted the trust, to hold the trust property beneficially. *Ib.*

4. Communications between solicitor and

PROBATE DUTY.

client through the medium of an agent, are protected equally with communications had directly with the principal. *Ib.*

5. The existence of an illegal purpose would prevent any privilege from attaching to the communications between solicitor and client—*semble*. *Ib.*

6. The clerk of a solicitor, who was the solicitor of the mortgagor and mortgagee in the creation of the security, and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of preparing the mortgage deed, which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document (which proof alone does not make it evidence); but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction; and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. *Chant v. Brown*, ix. 790

7. The consent of the personal representative of the mortgagor, who was one of the clients of the solicitor, to the admission of the bill of costs in evidence, does not make it evidence which can be admitted against the parties claiming under the mortgagee, the other client. *Ib.*

8. Communications with the solicitor of the mortgagor only, or with the solicitor of persons having interests in the mortgaged estate in default of appointment, such solicitor not being the solicitor of the mortgagee, are not privileged communications when tendered as evidence in a suit to impeach the mortgage security as having been founded on an appointment made in fraud of the power. *Ib.*

PROBABILITIES.

See FINES ON RENEWAL.

PROBATE.

See LETTERS OF ADMINISTRATION—POWER.

Semble, the question whether a prerogative or a diocesan probate is necessary, depends, not upon the place in which the estate of the testator comes to be administered, but on the local situation of the property at the time of his death. *Jones v. Howells*, ii. 342

PROBATE DUTY.

See EXECUTOR AND ADMINISTRATOR—PARTNERSHIP.

PROCEEDINGS AT LAW.

PROCEEDINGS AT LAW.

See INJUNCTION.

PROCEEDINGS BEFORE THE JUDGE IN CHAMBERS.

See APPENDIX, vol ix, pp. xlviii, lxxxiii.

PROCEEDINGS IN CHAMBERS.

See APPENDIX, vol. x, p. lxvi.

PRO CONFESSO.

See ABSCONDING—APPENDIX, vol. x, p. lvii
—BILL OF REVIVOR—INTERPLEADER—
MOTION.

1. A defendant in contempt for not answering the bill, brought to the bar and remanded, and again brought up by habeas corpus, twenty-eight days after having been remanded, upon motion to take the bill pro confesso, under the statute 1 Will. 4, c. 36, s. 15, rule 2, may file his answer after the motion is made; and, *semble*, at the latest time on that day. *Robinson v. Stanford*, ii. 149

2. Process for taking a bill pro confesso under the 1st Order of the 11th of April, 1842, against a defendant deemed to have absconded, after appearance by his own clerk in court. *Harrison v. Stewardson*, ii. 583

3. Order I. of the 11th of April, 1842, as to taking bills pro confesso, applies to suits commenced before, as well as after, the date of the order. *Ib.*

4. Proceedings for taking the bill pro confesso, under the Order I. of the 11th of April, 1842, against a defendant deemed to have absconded, for whom an appearance has been entered under the Order VIII. of the 26th of August, 1841, and who does not afterwards appear by his own solicitor. *Elloft v. Brown*, ii. 618

5. Where a defendant, after being served with the subpoena to appear and answer the bill, does not enter an appearance by his own solicitor, but absconds to avoid the process of the court, the plaintiff may, on the bill taken pro confesso, under the Order I. of the 11th of April, 1842, proceed ex parte as against a defendant who has not appeared, although the plaintiff has entered an appearance for him, under the Order VIII. of the 26th of August, 1841. *S. C.*, ii. 621

6. Bill ordered to be taken pro confesso in vacation, under the statute 1 Will 4, c. 36, s. 15, rule 2. *Simmons v. Wood*, ii. 644

7. Practice on taking bills pro confesso, under the 77th and 78th Orders of May, 564

PRODUCTION OF DOCUMENTS.

1845, against a defendant deemed to have absconded, after appearance by his own solicitor. *Courage v. Wardell*, iv. 481

PRODUCTION.

See DISCOVERY.

PRODUCTION OF DEEDS.

See TITLE DEEDS.

PRODUCTION OF DOCUMENTS.

See AFFIDAVIT — APPENDIX, vol. ix, p. xlix; vol. x, p. xxxi.—DISCOVERY.

1. An admission in the answer to a bill of discovery, that the defendant possessed documents specified in a schedule wholly or in part relating to the matters mentioned in the bill, not accompanied by a precise denial of a precise case which the bill specifically charged, or by a denial that the documents related to that case.—*Held* to entitle the plaintiff to the inspection of all the documents in the schedule which might be evidence on the case so specifically charged, although the defendant said they were the evidences of his own title. *Smith Duke of Beaufort*, i. 507

2. On a motion for the production of documents, a survey or valuation of the property to which the question in the cause related, described by the defendant as consisting of his evidence, and supporting his case, and not that of the plaintiff, and made with a view to the defence in the suit,—was considered as a minute furnished by a witness of the evidence he would give, and, as such, it was held, that the plaintiff was not entitled to the production of it. *Llewellyn v. Badeley*, i. 527

3. Title-deed of the defendant ordered to be produced, where it contains a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom v. Clarkson*, ii. 166

4. Documents directed to be deposited with the clerk of records and writs, after an order allowing the plaintiff or his solicitors to inspect and take copies thereof at the office of the defendant's solicitors,—the solicitors not agreeing by whom the copies were to be made. *Prentice v. Phillips*, ii. 152

5. Delay in moving for production of documents until after the defendant's witnesses are examined, and the exhibits marked, whereby the plaintiff may ascertain which are the defendant's exhibits, is no objection to the order being made. *Duke of Beaufort v. Taylor*, ii. 245

6. In a suit for taking a partnership account between solicitors, the plaintiff is

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entitled to the discovery and production, in the usual way, of papers material to the account, although such papers relate to professional business transacted for their clients—*semble*. *Brown v. Perkins*, ii. 540

7. Upon a motion that the defendant might produce documents in the schedule to his answer—*Held*, that written communications which passed between the defendant and his solicitor before any dispute had arisen between the parties to the suit were privileged, so far as they contained legal advice or opinions, but not otherwise—although relating to the matters which formed the subject of the suit. *Walsingham (Lord) v. Goodricke (Bart.)*, iii. 122

8. There is no essential difference, with respect to the privilege of professional confidence, between cases stated for the opinion of counsel and other communications. *Ib.*

PROFESSIONAL CONFIDENCE.

See DISCOVERY—PRODUCTION OF DOCUMENTS.

PROFITS.

See JOINT-STOCK COMPANY—PARTNER—PARTNERSHIP—SOLICITOR AND CLIENT—TRUST.

PROHIBITION.

See JURISDICTION.

PRO INTERESSE SUO.

See ADMINISTRATION SUIT—SEQUESTRATION.

1. A defendant, being in contempt for non-payment of money, executed a conveyance of his real estate to his son, and the son entered into possession under the conveyance. Some months afterwards, a sequestration issued against the defendant founded on the same contempt, and the sequestrator took possession of the estate. The defendant's son was examined pro interesse suo; and the Master found, that, as between the defendant and all persons claiming under him, the son had an absolute estate and interest in the premises under the conveyance, and the possession taken thereunder, subject to the question between the defendant's son and the plaintiffs, or between the Court and plaintiffs, and the defendant's son, arising out of the contempt and the sequestration: the Court directed issues to try whether the conveyance by the defendant to his son was fraudulent, within the statute 13 Eliz. c. 5; and whether the consideration-mones were

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paid before the sequestration issued. *Empringham v. Short*, iii. 461

2. Whether the proper form of objecting to the report of the Master or an examination pro interesse suo is by exceptions—*quære*. *Ib.*

PROJECTORS.

See JOINT-STOCK COMPANY.

PROJECTORS OF RAILWAY.

See JOINT-STOCK COMPANY.

PROLIXITY.

Prolixity in setting out at length, in a petition or other pleading, clauses of a public statute. *In re Manchester and Leeds Railway Company, Ex parte Osbaldis-ton*, viii. 31

PROMISSORY NOTE.

See STATUTES, CONSTRUCTION OF, 21 Jac 1, c. 16, s. 3.

PROOF OF DEBT.

See CREDITORS' SUIT.

PROOF OF EXHIBITS.

See BILL AND ANSWER.

PROPER USE.

See SEPARATE USE.

PROPERTY.

See POWER.

PROSECUTION.

See DISMISSAL OF BILL.

PROSPECTIVE ORDER.

See APPENDIX, vol. ix, p. lxxiv.

PROTESTANT DISSENTERS.

See TRUSTEE AND CESTUI QUE TRUST.

PROVISIONAL ASSIGNEE.

See COSTS—MORTGAGOR AND MORTGAGEE—VENDOR AND PURCHASER.

PROVISIONAL COMMITTEE.

See JOINT-STOCK COMPANY.

PUBLIC OR PRIVATE ACT.

See ACT OF PARLIAMENT.

PUBLICATION.

PUBLICATION.

See DISMISSAL OF BILL — EVIDENCE —
REPLICATION—SETTING DOWN CAUSE.

PUBLIC FUNDS.

See TRUSTEE AND CESTUI QUE TRUST.

PUBLIC POLICY.

See CHAMPERTY.

1. Parties to a contract, which is against public policy or illegal, are not always regarded as being in *pari delicto*; but public policy is sometimes considered as advanced by allowing either, or the more excusable, of the parties to sue for relief against the transaction. *Reynell v. Sprye*, viii. 275

2. An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, and is against public policy; and in such a case, the Court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *The Great Northern Railway Company v. The Eastern Counties Railway Company*, ix 306.

PUFFER.

See VENDOR AND PURCHASER.

PURCHASE DEED.

See APPENDIX, vol. ix, p. lxxxv; vol. x, p. lxx.

PURCHASE-MONEY.

See APPENDIX, vol. ix, p. 1 — INTEREST—SHIP.

PURCHASER.

See COSTS — EQUITABLE MORTGAGE — STATUTES, CONSTRUCTION OF, 27 *Eliz.* c. 4—TITHES—VOLUNTARY DEED.

A purchaser, attending the sale of an estate in the cause, heard the amount of the reserved bidding announced before he made his offer; and the Master made a separate report, allowing him as the purchaser, subject to the approval of the Court with reference to that fact. The mode of confirming this report and approving of the purchase is by a special notice of motion to that effect, and not, as in the

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common case, by orders *nisi* and absolute. *Dowle v. Lucy*, iv. 311

PURCHASES FOR RE-INVESTMENT.

See APPENDIX, vol. ix, p. 1.

QUALIFIED ACCEPTANCE OF OFFER.

See AGREEMENT.

RAILWAYS CLAUSES CONSOLIDATION ACT.

See STATUTES, CONSTRUCTION OF, 8 & 9 *Vict.* c. 20.

RAILWAY COMPANY.

See ACQUIESCENCE — JOINT-STOCK COMPANY — PARLIAMENTARY POWERS — PARTNERSHIP — PUBLIC POLICY — SPECIFIC PERFORMANCE — TITHES — TOLLS — VENDOR AND PURCHASER.

1. Construction of an agreement between two railway companies enabling one to pass over and use the railway stations, watering places, and sidings, upon and appertaining to the other, and giving the right of access to such part of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as their own traffic of the like character should receive. *The Great Northern Railway Company v. The Eastern Counties Railway Company*, ix. 309

2. One railway company having granted to another the use of their lines, and of all conveniences upon the lines, cannot object to their grantees using the conveniences so granted for any purposes to which they may be able to apply them, even if the grantors themselves were not entitled to use them for such purposes—*semble*. *S. C.*, ix. 310

3. Where a railway company are entitled to retain the possession of lands which they have taken, they must also be entitled under their compulsory powers to perfect their title. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, ix. 446

4. A provision in an Act for making a railway, that certain land to be purchased by the railway company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith (except such part as might be required by the Board of Ordnance, or for widening approaches to the station), and should not be used or employed for erecting thereon any coke ovens, or for any

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other purposes (the necessary railway purposes only excepted) by which any nuisance might be created, or the other property of the vendors in any way damaged:—*Held*, to refer to the use of the land, or the mode in which it was to be laid out or applied, and not to refer specifically to the use of the buildings which might be erected upon the land. *The Warden and Assistants of the Harbour of Dover v. The South Eastern Railway Company*, ix. 489

5. That "buildings connected therewith" did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway; and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways. *Ib.*

6. That, the building erected by the company being used as a custom-house for the examination of the luggage of passengers landing from the continent, many of whom travelled by the railway, such user was for a purpose connected with the railway; and that the use being, to some extent, for such purpose, it did not cease to be so within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway. *Ib.*

7. The object of the 87th section of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), is to enable one Railway Company to contract for the passing of their trains to the limits of the railway of another company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one railway, under colour of passing over the line of another company, to carry the whole of the traffic of the other railway over which they may agree to pass. *Simpson v. Denison*, x. 51

8. An agreement by one railway company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other company, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act. *Ib.*

9. It is not lawful to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted; and the Court will interfere, by injunction, at the suit of a shareholder, to restrain any such application. *Ib.*

10. The same principles which regulate the rights of parties in ordinary partnerships, are applicable in determining the duties of the managing bodies in joint-stock companies as between them and members of such companies. *Ib.*

11. The Court will enforce by injunction the provision of the 115th section of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the Act; and notwithstanding also, that, to enforce such right of inspection, would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing company. *The Midland Railway Company v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, x. 359

12. Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Consolidation Act (s. 3), defined to mean "the railway and the works by the special Act authorised to be constructed," and these have been construed to include a station, yet it is very doubtful whether the power reserved to the public by the Railways Clauses Consolidation Act (s. 92), to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the company. *Ib.*

13. An interpretation clause in an Act of Parliament should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation. *Ib.*

14. The Court refused to restrain one railway company from using the station of another, under an agreement which was made between the two companies, before a connection had been established between the company using the station and a third company, which brought such third company into competition with the company to whom the station belonged—it not being clear that the right of the defendants to use the station was not intended to be given by their special Act—the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject

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of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing company having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction. *Ib.*

RAILWAY WORKS.

See ACCOUNT—JURISDICTION.

RATES.

See CHARITABLE USE — TRUSTEE AND CESTUI QUE TRUST.

REAL ESTATE.

See ALIEN—CONVERSION—DEBTOR AND CREDITOR.

REAPPOINTMENT.

See APPOINTMENT.

RECEIPT CLAUSE.

See SEPARATE USE.

RECEIVER.

See APPENDIX, vol. ix, p. 1; vol. x, p. lxi—GENERAL ORDERS, 1796, April 23—MOTION.

1. A mortgagor having only a life-interest in the mortgaged premises, and a mortgagee having a charge both on the life-interest and on the interest in remainder, by a joint deed appoint a receiver, who is directed to pay certain debts, expenses, and the charge on the life-interest, and to keep down the interest on the residue. The mortgagee dies, and afterwards the mortgagor. The receiver continues in receipt of the rents and profits after the death of the mortgagor, and pays some part of the rents to the representatives of the mortgagee:—*Held*, that, upon the construction of the deed, the possession of the receiver was not the possession of the mortgagee; but there was ground for an inquiry whether the representative of the mortgagee had by any acts constituted the receiver her agent exclusively. *Jones v. Smith*, i. 43

2. Where probate or administration has been granted by the Ecclesiastical Court, a receiver will not be appointed pending litigation to recall probate or grant of admini-

stration, unless a special case be made out for such appointment. *Rendall v. Rendall*, i. 152

3. Where no probate or administration has been granted, it is of course to appoint a receiver pending a bona fide litigation in the Ecclesiastical Court, to determine the right to probate or administration, unless a special case can be made for refusing such appointment. *Ib.*

4. The fact that the litigation in the Ecclesiastical Court is on the question of which of two alleged wills shall be admitted to probate, and that the defendant in the suit in equity is named executor in both wills, is not a ground for refusing to appoint a receiver. *Ib.*

5. The appointment of a testamentary guardian of an infant by his father, does not, under the statute 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant. *Gardner v. Blane*, i. 381

6. Where there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain. *Browell v. Reed*, i. 434

7. Receiver of a West India estate applied for by one of the parties entitled to a charge thereon, against the trustee, refused notwithstanding the estate was depreciated in value, and incumbrances thereon were increasing,—the management of the trustee not appearing to be improper. *Barkley v. Lord Reay*, ii. 308

8. Plaintiff, entitled to a legacy, charged on a West India estate, subject to prior debts and legacies remaining unpaid, not entitled to have a receiver appointed over the estate. *Faulkner v. Daniel*, iii. 204

9. In suits by creditors and legatees a receiver was appointed of the rents and profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the court-baron of the manor, proclamations were made for the next tenant to come in and be admitted, and, no person appearing, the bailiff of the manor was ordered to seize the lands quousque. Declaration in ejectment at the suit of the lord was afterwards served on the terre-tenant; but, on the motion of the receiver, the lord was restrained by injunction from prosecuting the action. *Evelyn v. Lewis*, iii. 472

10. A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession, without the authority of the Court. *Ward v. Swift*, vi. 312

11. A motion ought not to be made for committal on the ground of a disturbance of the possession of a receiver, when the

RECEIVER.

object of the motion is merely to compel the payment of costs, after the question with respect to the possession of the property has been settled. *Ward v. Swift*, vi. 312

12. Where there were two suits for administration, and a motion for a receiver in each suit came on upon the same day, the receiver was appointed in both suits, and the Court gave the carriage of the order to the plaintiffs by whom the first notice of motion for the receiver had been given. *Hart v. Tulk*, vi. 611

13. Upon the bill of an equitable mortgagee, leave was given to serve the defendant, the mortgagor, before appearance, with notice of motion for a receiver (the bill not asking for an injunction); and the order was made, upon affidavit of service, for the appointment of the receiver, with liberty to the parties to propose themselves, according to the notice. *Meadon v. Sealey*, vi. 620

14. It is not necessary to bring to a hearing a suit for the appointment of a receiver pendente lite. *Anderson v. Guichard*, ix. 275

15. A receiver was appointed by the Court of the rates, tolls, duties and other property, of a canal and railway company, incorporated by Act of Parliament, notwithstanding that the Act of incorporation provided that a committee of twelve of the proprietors should be elected at every annual general meeting to manage the affairs of the company. *Fripp v. The Chard Railway Company*; *Fripp v. The Bridgewater and Taunton Canal, &c., Cos.* xi. 241

16. Considerations on the selection of a receiver and manager of the property and business of a company, so as to avoid the appointment of any person whose individual pecuniary interests might conflict with the duties of his office, in respect to those for whose benefit the appointment is made. *Ib.*

RECITAL.

See EVIDENCE—PRODUCTION OF DOCUMENTS.

RECORDS.

See TAKING BILL OFF THE FILE.

Production of the original records of this Court at trials in other Courts. *Attorney-General v. Ray*, vii. 335

RECOVERY.

See CONSTRUCTION.

RECTIFYING SETTLEMENT.

RECTIFYING DEED.

1. A sum of money was charged upon an estate as portions for younger children, according to the appointment of the parents to take effect after their deaths; and the parents, in contemplation of the marriage of their daughter, and of a settlement which her intended husband proposed to make, appointed £5,000, part of the sum so charged, to the daughter, in case the marriage should take effect. By a settlement of the same date, a jointure was secured to the daughter by the husband. The marriage took place, and some years afterwards, the father being then dead, an arrangement was made for the sale of the estate, and for the investment in the funds of the sum necessary to provide for the portions. The money was accordingly raised, and invested in the names, among others, of the daughter and her husband, and a declaration executed, in which the trusts of the stock purchased with the £5,000 was declared to be (subject to the life interest of the mother) for the daughter absolutely. After the death of the father and mother and the husband, the Court, at the suit of the representative of the husband, rectified the declaration of trust by declaring the £5,000 to be the property of the husband, inasmuch as it did not appear that the husband intended to part with his interest in the fund, or do more than approve of the change of security; the declaration of trust omitting any recital of the settlement on the marriage, and it appearing from the letters which had passed between the solicitors of the parties, when the declaration was made, that neither of such solicitors was aware of that settlement, or of its effect as to the portion of the daughter. *Ashhurst v. Mill*, vii. 502

2. Variation of the effect of a deed, made for the purpose of carrying into effect a family arrangement, where it contained a declaration of right inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered. *Ib.*

RECTIFYING SETTLEMENT.

In a marriage settlement the property of the wife was conveyed and assigned in trust for the wife for life for her separate use, remainder to the husband for his life, remainder to the children of the marriage, and, in default of issue of the marriage, to the brother of the wife and his children. After the marriage the husband and wife filed their bill, charging that the brother, who

RECTIFYING SETTLEMENT.

was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife in default of issue of the marriage, and praying that the settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it; but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the engrossment; and the answer of the brother stated that, the power having been noticed by him when the engrossment was read over to him, he objected to it, as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out. The Court held that it was the duty of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point; and that relief might be given in the suit, subject to the question whether the wife knew, when she executed the settlement, that it did not contain the power. *Harbidge v. Wogan*, v. 258

REDEMPTION.

See ANNUITY—BUILDING SOCIETY—COSTS—DECREE—ESCHEAT—MORTGAGE—MORTGAGOR AND MORTGAGEE—SPECIFIC PERFORMANCE.

REDEMPTION SUIT.

See MORTGAGOR AND MORTGAGEE.

REDUCTION INTO POSSESSION.

See HUSBAND AND WIFE.

RE-EXAMINATION.

See EVIDENCE—WITNESS.

REFERENCE.

See APPENDIX, vol. ix, pp. 1, lxxvi—DECREE.

REFERENCE OF TITLE.

See DISMISSAL OF BILL—VENDOR AND PURCHASER.

REFERENTIAL GIFT.

See LEGACY.

RELEASES TO USES.

REGISTRAR.

See ORDER—PRIVILEGE—SETTING DOWN CAUSE.

REHEARING.

See STAY OF PROCEEDINGS.

Cause set down again for hearing on further directions, on the petition of defendants out of the jurisdiction at the first hearing, who subsequently appeared, in order to enable them to appeal from the decree. *Prendergast v. Lushington*, v. 177

RELEASE.

See DEBTOR AND CREDITOR—INFANT—JURISDICTION—PARTNERSHIP.

1. By a deed conveying the real and personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate and enure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, and demands, both at law and in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mortgage, pledge, lien, or other specific security which any creditor possessed:—*Held*, upon the construction of the entire deed, that such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees. *Squire v. Ford*, ix. 47

2. Principles of the Court in giving effect to the intention of the parties to a general release, with reference to the restrictive clauses which it contains, or to the purposes for which it is made. *S. C.*, ix. 55

3. Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged. *Clifford v. Clifford*, ix. 675

RELEASES TO USES.

See VENDOR AND PURCHASER.

RELIGIOUS PURPOSE.

RELIGIOUS PURPOSE.

See CHARITY.

REMAINDER.

*See CONSTRUCTION—JOINT TENANCY—
RE MOTENESS.*

REMEDY AT LAW.

See PARTNERSHIP.

RE MOTENESS.

See DEVISE—LEGACY.

1. In a devise of real estate upon trust for the daughter of the testator for her life, and from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance; the interest of such child's share, notwithstanding such child's share should not be then absolutely vested—the limitation to the children of the daughter and the limitations over on default of such children, are void for remoteness. *Bull v. Pritchard*, v. 567

2. Devise and bequest of freehold and leasehold estates to trustees, upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law and equity would permit, the testator's six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, and, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children and of the survivor, should take the share of him or her so dying of the said rents and profits; and that, upon the death of all his said other children, as to the leasehold estates, the same to go and belong to the issue of his said other children for their respective lives, in equal shares, with benefit of survivorship; and as to the freehold estates, the issue of his said children to take the rents, profits, and proceeds thereof for their respective lives, in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and if any of such issue of his said children should die leaving issue, the child and children of him or her so dying, during the lives of such issue of his

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said children and of the survivor of them, should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go and belong to the child and children of such issue absolutely as tenants in common; and as to the said freehold estates, in case the issue of his said children, or any of them, should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and, if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original and accrued shares of such child or children whose children should so fail, to the use of the remaining and other and others of the said children, and the heirs of the body or bodies of such remaining and other children, and, if more than one, equally as tenants in common; and in default of such issue of the issue of his said children, to the use of the right heirs of the testator. The six younger children of the testator survived him. Some of them had children at the time of his death, and some had children born after his death:—*Held*, that the six younger children of the testator took life interests in both the freehold and leasehold estates, with remainder, as to the freeholds, to the children of such younger children as tenants in common in tail, with cross remainders between and among them, and the ultimate remainder to the testator's right heirs; and, *semble*, that the same children of such younger children (after the decease of the last survivor of their respective parents, the tenants for life) take absolute interests in the leaseholds. *Williams v. Teale*, vi. 239

3. That, in considering the validity of the limitations, the state of the family at the death of the testator (and not at the date of his will) is to be regarded; and, therefore, if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, and the parent die in the lifetime of the testator, and the class be ascertained at the testator's death, the gift is valid. *Id.*

4. That the limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator. *Id.*

5. That where, upon the decease of the testator's "children," the estate was given

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to the "issue" of such children, and where it was given over in case the testator's "children" should die "without leaving issue," and in like uses of the word issue, the word "issue" must be read "child or children," although, in other parts of the will, it might be necessary to read the word "issue" in a different sense. *Ib.*

6. A gift of residuary estate in trust for such child or children of A., as being a son or sons should live to attain the age of twenty-five years, or being a daughter or daughters should live to attain that age or marry, equally to be divided between them, if more than one; but if but one, then the whole to that one, their, his, or her heirs, executors, administrators, or assigns, according to the nature and quality thereof; provided that, if any of them should die under such age or time as aforesaid leaving issue him or her surviving, such issue should take the same share as his, her, or their parents attaining such age as aforesaid would have done; with provision for applying the income of the share of every such child, or his or her issue, or a sufficient part thereof, in their maintenance and education, and for an application of a reasonable part of the expectant share of any such child or their issue to his, her, or their advancement, notwithstanding their minority:—*Held* to be void for remoteness. *Boreham v. Bignall*, viii. 131

7. The plaintiffs claiming to be residuary legatees, but failing in that claim on the ground of the remoteness of the bequest, a declaration was made of the invalidity of the trusts; and the costs of the suit were paid out of the estate. *Ib.*

8. The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement; and after his youngest child should have attained twenty-one, he directed his executors to divide any surplus in their hands, every three years during his wife's life or widowhood, and after her death or marriage every year, equally amongst his children, or their heirs instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that, at the end of the said fifty years, his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs, equally:—*Held*, that the Court could not read "or" as "and," where the pur-

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pose was manifestly substitution of objects, and not succession. *Speakman v. Speakman*, viii. 180

9. That the word "heirs" must be construed "issue," and not "children;" and that it was not a ground for departing from such meaning that the consequence of adhering to it would be to render the will void for remoteness. *Ib.*

10. That the words of the gift did not direct a substitution, once for all, of persons to take each child's share at a given time not too remote; but contained a running direction to the trustees, to pay the income from time to time, during the whole period of fifty years, to the children, or, in case of their deaths, to such of their lineal descendants as might from time to time come in esse. *Ib.*

11. That the limitations of the property at the end of the term of fifty years were void for remoteness. *Ib.*

12. After a devise to A. for life, with remainder to all and every the child and children of A. for their lives, in equal shares, a devise over, after the decease of any or either of such child or children, of the part or share of him, her, or them so dying, unto his, her, or their child or children, begotten or to be begotten, and to his, her, or their heirs for ever, as tenants in common, is good as to the children of such children of A. as were living at the death of the testator, for the gift to them must take effect, if at all, within the limits allowed by law; and the gift to every member of the class of children is single and independent of the gift to every other member of the same class, and cannot be affected by the result of the gift as to such other members. *Catlin v. Brown*, xi. 372.

RENEWAL.

See COVENANT.

RENEWAL OF LEASE.

See SPECIFIC PERFORMANCE — VENDOR AND PURCHASER.

1. Equity will not decree the specific performance of a covenant by the mesne landlord with his lessee for the renewal of the lease, after the lessee has wilfully neglected or refused to renew; and the non-payment, after demand, of the fine which the mesne landlord has paid to the superior landlord, amounts to such neglect or refusal. *Chesterman v. Mann*, ix. 206

2. An under-lessee who is not himself bound to take a renewal of his lease, but who is entitled to the benefit of a covenant by his lessor for the renewal of his under-

RENEWAL OF LEASE.

lease, upon payment of his proportion of the fines and expenses of a renewal by the superior landlord, ought, if he complains of the amount of such proportion required from him by the mesne landlord, to apply without delay to a court of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that court, to compel him to pay a reasonable sum; and if, instead of making such application, and after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable, will not excuse his laches. *Ib.*

3. The time from which the lessee will be deemed to have neglected or refused to renew, is not to be computed from the latest time at which the mesne landlord might have procured a renewal; but from the time at which he applies to the under-lessee to contribute to the fine and expenses of the renewal which he is about to obtain or has obtained. *Ib.*

RENT.

See CONVERSION—EQUITABLE SET-OFF—STATUTES, CONSTRUCTION OF, 4 & 5 Will. 4, c. 22.

RENT-CHARGE.

See DEVISE.

RENTS AND PROFITS.

See CHARGE.

REPAIRS.

See SHIP.

REPLEVIN.

See PENALTIES.

REPLICATION.

See APPENDIX, vol. ix, p. lxxxvii—DISMISSAL OF BILL—EVIDENCE—GENERAL ORDERS 1842, Oct. r. xxiii—PLEADING.

1. The application, under the 15th Order of 1828, for leave to withdraw replication and amend the bill, is not sufficiently supported by an affidavit of the solicitor of the plaintiff that the proposed amendment is material. *Phillips v. Goding*, i. 40

2. A plaintiff, who, upon a motion to dismiss his bill for want of prosecution, has undertaken to speed the cause, according to the terms of the 16th Order of 1831, is

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not bound to file a replication within three weeks from the date of his undertaking, if he does not require a commission to examine witnesses. *Darby v. Smale*, i. 490

3. After replication had been filed, the defendant became entitled to move to dismiss the bill before the Orders of May, 1845, came into operation. On motion afterwards, leave was given to the plaintiff to file a replication under the new orders, within a week, and if not, the bill to be dismissed. *Brandt v. Epps*, iv. 343

4. The Court will not, as of course, or except in cases of necessity, give the plaintiff leave, under the reservation in the 93rd Order of May, 1845, to file more than one replication in the same cause. *Stinton v. Taylor*, iv. 608

5. The exclusion of the time of vacation from the computation of time for filing replications, in the 4th article of the 14th Order of May, 1845, does not apply to the time for filing replications generally, but only to the time for filing replications under the exigencies of the 41st article of the 6th Order of May, 1845. *Ib.*

6. Where a plaintiff had by mistake submitted to an order limiting him to a time for filing his replication as against some defendants, the Court refused, on a motion ex parte, to give him liberty to file another replication against the other defendants, but permitted him to move, on notice, for leave to withdraw the replication, or that publication might be enlarged. *Ib.*

7. Orders giving leave to the plaintiff to file a replication, and to set down the cause as against the defendants who had appeared and answered; upon affidavit that another defendant could not be found to be served with process, the plaintiff being unable to make the suit effectual against such other defendant under any of the General Orders of the Court. *Mores v. Mores*, vi. 127

REPORT.

See CONTEMPT—EXCEPTIONS.

1. On the reference of an answer for insufficiency, if the Master's report be not made within a fortnight, and the Master does not within that time certify that he enlarged the time for making the report, the report afterwards made on the same reference will, under the 12th General Order of 1828, be irregular. *Kaye v. Wall*, iv. 283

2. It is not material whether the certificate of enlargement of time be filed or not—semble. *Ib.*

REPRESENTATIVES.

See LEGACY.

REPUBLICATION.

REPUBLICATION.

See STATUTES, CONSTRUCTION OF, 7 Will. 4
§ 1 Vict. c. 26, s. 34.

REPUDIATION OF SUIT.

See JOINT-STOCK COMPANY.

REPUTATION.

See VENUE.

RES INTER ALIOS ACTA.

See AGREEMENT.

RES JUDICATA.

See CO-DEFENDANTS—JURISDICTION.

RESCINDING CONTRACT.

See VENDOR AND PURCHASER.

RESIDUARY DEVISE.

See VOID DEVISE.

RESIDUARY ESTATE.

See JOINT TENANCY.

RESIDUARY LEGATEE.

See DEBTOR AND CREDITOR—LEGACY—
LEGATEES—POWER—TENANCY IN COM-
MON.

RESIDUARY SHARE.

A gift by a will, of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life, with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly:—*Held*, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of. *Humble v. Shore*, vii. 247

RESIDUE.

See LAPSE.

RESOLUTION.

See JOINT STOCK COMPANY.

RESTORATION OF BILL.

See DEMURRER.

REVOCATION.

RESTRAINT.

See ALIENATION.

RESTRAINT ON ALIENATION.

See HUSBAND AND WIFE.

RETAINER.

See ADMINISTRATION—COSTS—EQUITABLE
SET OFF.

The representative of a deceased executor, in accounting for the executor's receipts of the trust estate:—*Held*, not to be entitled, by way of discharge, to the amount of a debt owing to the executor from his testator, without evidence of retainer of the debt by the executor in his lifetime: the amount can only be claimed as a debt against the estate. *Burge v. Brutton*, ii. 373

REVERSAL OF OUTLAWRY.

See OUTLAWRY.

REVERSION.

See HUSBAND AND WIFE—MORTGAGE—
PARTIES.

REVERSIONARY INTEREST.

See JOINT TENANCY—MORTGAGOR AND
MORTGAGEE.

REVIVOR.

See ABATEMENT—COSTS—DECREE—LU-
NACY—PLEA—SUBSTITUTED SERVICE—
TAXATION.

REVIVOR AND SUPPLEMENT.

See APPENDIX, vol. ix, pp. li, lxxxviii;
vol. x, p. xxxi.

REVOCATION.

See ADEMPITION—APPOINTMENT—DEBTOR
AND CREDITOR—HEIR-AT-LAW—RESI-
DUARY SHARE—VOLUNTARY DEED—
VOLUNTARY INSTRUMENT.

Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will:—*Held*, that the erasure in pencil raised no presumption of revocation; and that, without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis v. Grover*, v. 39

RULE OF COURT.

RULE OF COURT.

See AWARD.

An agreement to dismiss a bill of this Court, entered into by the plaintiff and defendants in the suit, at the trial of an action, and made a rule of the Court of law, enforced as against the parties, by motion in the cause, in this Court. *Tebbut v. Potter*, iv. 164

RULE TO SET ASIDE JUDGMENT.

See JURISDICTION.

SALE.

See APPENDIX, vol. x, pp. vii, lxxiv—CHARITY—CONDUCT OF SALE—CONVERSION—DOWER—EQUITABLE MORTGAGEE—FORECLOSURE—MORTGAGOR AND MORTGAGE—PARTIES—STATUTES, CONSTRUCTION OF, 1 Will. 4, c. 60.

A conveyance of an estate to A., in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon non-payment after notice, entitles him to the aid of the Court in effecting a sale. *Sampson v. Pattison*, i. 533

SALE OF SEQUESTERED PROPERTY.

See SEQUESTRATION.

SALE OF SHARES BY DIRECTOR TO THE COMPANY.

See JOINT-STOCK COMPANY.

SALE UNDER DECREE.

See VENDOR AND PURCHASER.

SALE BEFORE THE MASTER.

See CONTRACT.

SALE IN FORECLOSURE SUITS.

See APPENDIX, vol. ix, p. liii.

SALE AND EXCHANGE.

See CONSTRUCTION.

SATISFACTION.

See PORTION.

1. A trust fund, to which a father was entitled for life, and his son and daughter in remainder, was sold, and the proceeds received by the father. Subsequently, on the marriage of the daughter, the father settled property for her benefit of a larger

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value than the proceeds of the trust fund:—*Held*, that the claim of the daughter against the father in respect of her share of the proceeds of the trust fund must be presumed to be satisfied by the settlement. *Plunkett v. Lewis*, iii. 316

2. That neither the expression in the settlement of the consideration of natural love and affection, nor the ignorance of the husband of the rights of the wife in the trust fund, had the effect of excluding the presumption of satisfaction. *Ib.*

3. Evidence is admissible either to support or rebut the presumption—*semble*. *Ib.*

4. Whether in the case of a portion of the precise amount of the debt, the expression of natural love and affection, as the consideration for the settlement, might not be material on the question of satisfaction—*quære*. *Ib.*

5. Advances made by a father to his son, simpliciter, not a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son, possessed by the father after such advances. *S. C.*, iii. 330

SCANDAL.

See COSTS.

SCHEME.

See APPENDIX, vol. ix, p. liv; vol. x, pp. xxxi, lxxiv—CHARITY—CHURCHWARDEN.

SCHOOL.

See FREE SCHOOL—GRAMMAR SCHOOL.

SCHOOLMASTER.

See JURISDICTION.

SCIRE FACIAS.

See SUBSTITUTED SERVICE.

SCOTCH ENTAIL.

See PARTIES.

SCOTCH ESTATES.

See JURISDICTION.

SCRIP.

See JURISDICTION.

SCRIP-HOLDER.

See JOINT-STOCK COMPANY.

SECRET.

See INJUNCTION.

SECRET TRUST.

SECRET TRUST.

See TRUSTEE AND CESTUI QUE TRUST.

SECURITY.

See FINES ON RENEWAL—JURISDICTION—ORDER—STAY OF PROCEEDINGS—VENDOR AND PURCHASER.

SECURITY FOR COSTS.

See PLAINTIFF—PLAINTIFF OUT OF JURISDICTION.

The plaintiff in a cross suit (impeaching an instrument which the original suit seeks to enforce) although residing out of the jurisdiction, is not bound, as against the plaintiff in the original suit, to give security for costs. *Vincent v. Hunter*, v. 320

SEPARATE MAINTENANCE.

See HUSBAND AND WIFE.

SEPARATE USE.

See HUSBAND AND WIFE.

1. The testator directed an annuity to be paid by the trustees, appointed by his will, into the proper hands of his daughter A., the wife of L., for her own proper use and benefit:—*Held*, that it was not a trust for the separate use of the daughter. *Blacklow v. Laws*, ii. 49

2. Construction of a clause framed to restrain anticipation by a married woman of property settled to her separate use. *Harrop v. Howard*, iii. 624

3. It is not necessary in all cases that negative words should be introduced in the receipt clause to complete the restraint on anticipation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. *Ib.*

SEPARATION.

See HUSBAND AND WIFE.

SEQUESTRATION.

1. Where a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the Court. *Empringham v. Short*, iii. 461

2. A sequestration on mesne process will, in a proper case, be executed, and the Court will direct the tenants to attorn to the sequestrators; but will not, until

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the amount of the costs is ascertained, nor except for the purpose of paying such ascertained amount of costs, direct the sale of goods seized under the sequestration, even though the value of the goods be gradually absorbed by the expenses of keeping them. *Goldsmith v. Goldsmith*, v. 123

SERVANT.

1. A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service:—*Held*, not to exclude servants of the testator living in a different house from that in which the testator lived, but to exclude servants not hired by the year; and *held*, therefore, that a gardener, employed at weekly wages (although paid at irregular intervals), was not entitled to the benefit of the bequest. *Blackwell v. Pennant*, ix. 551

2. Whether the words "living with me," as applied to servants, should not be understood "living in my service"—*quere*. *S. C.*, ix. 553

SERVICE.

See AFFIDAVIT OF SERVICE—AMENDMENT—APPENDIX, vol. ix, p. lxxxix; vol. x, pp. xxxi, lxxv—BILL—COSTS—INFANT—MOTION—RECEIVER—SUBSTITUTED SERVICE—TRAVERSING NOTE—WITNESS.

1. Personal service on a plaintiff (suing in person,) of notice of appearance, is regular, under the 21st Order of the 26th of October, 1842, where the plaintiff has omitted to indorse on the subpoena to appear an address for service, as required by the 20th Order of the 26th of October, 1842, although an address for service has been indorsed on the bill. *Price v. Webb*, ii. 513

2. An order for leave to sue in forma pauperis is not inoperative although it is not served, where there is no mala fides in withholding it, and no step has been taken in the cause inconsistent with the order. *Church v. Marsh*, ii. 652

3. *Semle*, the same rule applies to orders of course, generally. *Ib.*

4. The leave of the Court is necessary in order to serve personally a party out of the jurisdiction with notice of a motion in a cause, although such party has been served out of the jurisdiction, under the stat. 4 & 5 Will. 4, c. 82, with the subpoena to appear and answer, and an appearance has been entered for him in the suit under that statute. *Green v. Pledger*, iii. 165

5. If a party in a suit may be served out

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of the jurisdiction, under the stat. 4 & 5 Will. 4, c. 82, in respect of any part of the subject of the suit, the service is good for all the other purposes of the suit. *Ib.*

6. Leave to serve notice of motion upon defendants before their appearance in the cause, does not include also leave to give short notice of the motion; and if other than the regular period of notice be given, leave for that purpose must be obtained, and will not be implied from the distance of the place of service. *Hart v. Tulk*, vi. 611

7. Where a party subject to costs could not be found, to be personally served, service of the subpoena for costs was ordered to be substituted on the town agent or country solicitor (or both, if both names were on the record), on motion *ex parte*. *Danford v. Cameron*, viii. 329

SERVICE OF THE DECREE OR ORDER.

See APPENDIX, vol. ix. pp. lv., lxxxix.

SERVICE OF NOTICE OF SALE.

See MORTGAGOR AND MORTGAGEE.

SET-OFF.

See COSTS—EQUITABLE SET-OFF.

1. A trustee of real estate became mortgagee of the trust estate, partly by taking an assignment of a prior mortgage, partly by taking an assignment of a mortgage created by his co-trustee and himself under their power for the purpose of the trust, and partly for money which he lent to the cestui que trust of the equity of redemption, subject to charges created by the will. The mortgagee and trustee filed his bill for foreclosure simply. The cestui que trust of the equity of redemption filed his bill for an account of the trust and of the mortgages, and that the mortgages might be ordered to stand as securities only for the balance due to the mortgagee and trustee upon the mortgage and trust accounts:—*Held*, that the Court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to, or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case. *Dodd v. Lydall*, *Lydall v. Dodd*, i. 333

2. Where a debt to the estate of a testator may be set off by the executors against a legacy bequeathed by the testator to the debtor, such debt may also be set off

SETTING DOWN CAUSE.

against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) in the legacy. *McMahon v. Burchell*, v. 325

3. Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other; and, therefore, an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife, the legatee) was, as such administrator, entitled. *Freeman v. Lomas*, ix. 109

4. The equitable right of set-off is not derived from or dependent upon any statutory right, but is founded on the Roman law—*semble*. *S. C.*, ix. 113

5. The Court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreement will not be presumed without some circumstances from which it might be inferred—*semble*. *S. C.*, ix. 114

6. Where one demand is equitable and the other legal, there may be set-off in equity, if there would be set-off at law had both the demands been legal. *S. C.*, ix. 116

SETTING ASIDE AWARD.

See AWARD.

SETTING DOWN CAUSE.

See BANKRUPT — PLEADING — REPLICATION.

1. Where one defendant had, without notice to his co-defendants, obtained an order from the Master to enlarge publication, and, before the enlarged time expired, another defendant, knowing of the order, set down the cause for hearing; the cause was ordered to be struck out of the Registrar's book, with costs to be paid by the defendant who had set it down. *Hughes v. Williams*, vi. 71

2. Where a bill has been retained at the hearing, with liberty for the plaintiff to bring an action, it is not irregular for the plaintiff, on having a verdict in his favour, to obtain an order for setting down the cause on further directions or on the equity reserved, although the time at which the defendant may move for a new trial shall not have arrived. *Rodgers v. Nowill*, vi. 338

SETTLEMENT.

SETTLEMENT.

See CHARGE—DECREE—FRAUD—HUSBAND AND WIFE—MARITAL RIGHT—POWER—SATISFACTION.

The children of a married woman, a defendant in a suit for the administration of an estate in which she was interested, are not entitled to a settlement out of their mother's share of the fund which is recovered in the cause after her death, although the mother died without putting in her answer in the cause, and therefore without any opportunity of claiming her equity to a settlement. *Baker v. Bayldon*, viii. 210

SETTLOR.

See PARTIES.

SEVERAL LIABILITY.

See ADMINISTRATION SUIT.

SEVERANCE OF DEFENDANTS IN THEIR ANSWERS.

See ANSWER.

SEVERING IN DEFENCE.

See COSTS.

SERVICE ABROAD.

See JURISDICTION.

SHAREHOLDERS.

See JOINT-STOCK COMPANY.

SHARES.

See JOINT-STOCK COMPANY—JURISDICTION—TITLE.

SHERIFF.

See EVIDENCE.

SHIFTING CLAUSE.

See CONSTRUCTION—DEVISE—WILL.

SHIP.

See CHARTERPARTY—FUTURE CARGO—INJUNCTION—JURISDICTION—LIEN—PARTIES—PATENT.

1. A ship belonging to the defendants, registered in the port of London, sustained serious damage on her voyage to New Zealand, and on her arrival there was surveyed and pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, and he at length sold the ship to the plaintiffs,

and, on receiving payment of the purchase-money by a bill of exchange on their house in London, executed to them a bill of sale of the ship. The plaintiffs repaired the ship and sent her to England with a cargo. The defendants refused to ratify the sale or consent to the registry of the ship in the plaintiffs' names, and, on the arrival of the ship in the port of London, the defendants put several men on board to take possession of the ship and cargo for them. The plaintiffs thereupon applied for an injunction to restrain the defendants from interfering with the ship, or removing her out of the jurisdiction, and for a manager and receiver of the ship and cargo:—*Held*, that the plaintiffs had no equitable, as distinct from a legal, title to the ship, and, inasmuch as their title (if they had acquired any) was a purely legal one, and the case of interference, if wrongful, was, therefore, a mere trespass, the Court would not interfere in favour of the plaintiffs by injunction. *Ridgway v. Roberts*, iv. 106.

2. That the plaintiffs, if they had acquired no title as owners of the ship by the purchase, had acquired none by way of lien in respect of the monies subsequently laid out on her repair. *Ib.*

3. That the bill of sale of the ship, if not effectual to pass the property to the plaintiffs, could not be treated as in the nature of a bottomry bond, inasmuch as none of the parties had intended that it should so operate. *Ib.*

4. That the plaintiffs, according to the case made on the motion, if they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange given for the purchase-money; and that they were entitled to have the trial of the legal right put in a course for determination, and to have the property protected in the meantime. *Ib.*

5. *Semble*, in such a case (independently of the relief in respect of the bill of exchange), if engagements had been contracted of which the conduct of the defendants would prevent the fulfilment, and if there could be no adequate compensation to the plaintiffs in damages, or if the defendants were about to carry away or destroy the property, the Court might interfere by injunction. *Ib.*

6. A ship was chartered to proceed to such places on the West Coast of Africa as the charterers should direct, and there load from their factor a full cargo of guano, and proceed to a port of the United Kingdom, to be paid at a certain freight per ton. The ship was directed to Ichaboe. The factor there (who was one of the

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charterers) endeavoured to provide a full cargo, but failed to procure more than a small quantity. The master of the ship (who was also a part owner) after waiting thirty-one days, seeing no probability of obtaining a full cargo from the factor, applied himself to complete the cargo by his own exertions and at his own expense, and finally succeeded in doing so, after having been ninety-three days at Ichaboe:—*Held*, on motion for an injunction, that the charterers were not entitled to that part of the cargo which had been procured by the exertions of the master without the assistance of the factor, and which the master claimed to hold as the property of the owners and not of the charterers. *Lidgett v. Williams*, iv. 456

7. There is nothing in the character or nature of the certificate of registry of a ship, which excludes it from the jurisdiction of the Court to decree its delivery as against a party unlawfully detaining it. *Gibson v. Ingo*, vi. 112

8. The master of a ship has no lien on the certificate of registry, either for his wages or for monies disbursed by him for the use of the ship; nor have the ship-brokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Ib.*

9. The master of a ship has no claim on the accruing freight, either for his wages or for monies disbursed by him for the use of the ship. *Ib.*

10. Ship-brokers advancing monies to the owner of a ship for the ship's use, having at the same time notice (by an indorsement on the certificate of registry) of a prior mortgage on the ship, are not entitled to be repaid their advances out of the freight in priority to the mortgagee, although the mortgagee does not take possession of the ship until after she has entered the docks from her homeward voyage. *Ib.*

11. The vendor of a ship, with a covenant for title, retains, after the sale (in order that he may fulfil his contract, and defend himself against an action brought upon his covenant), such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlawfully detaining it. *Ib.*

12. Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership. *Green v. Briggs*, vi. 395

13. A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in

which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends. *Ib.*

14. The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken; and it would seem that the circumstance that such repairs are not exhausted in the adventure, does not create any exception to the rule. *Ib.*

15. Monies were advanced by the plaintiffs to M. M., upon an agreement that they should be reimbursed by the proceeds of a ship then about to be launched in New Brunswick, and of her cargo, which were to be consigned by M. M. to the plaintiffs for sale; and a bill of lading of the cargo, and a power of attorney from the registered owner, enabling the plaintiffs to sell the ship, were transmitted by M. M. to the plaintiffs. M. M. afterwards transferred the ship and cargo to the firm of C. & G. The ship was thereupon registered in the names of C. & G. C. & G. sold the ship and cargo to the firm of R. & P., and the ship was then registered in the name of P. A new master was appointed and a new bill of lading signed, and the ship and cargo were consigned by R. & P. (with a power of attorney from P. to sell the ship) to R. & G., in which firm all the members of the firm of R. & P. were partners, except P. The plaintiffs filed their bill against C. & G., R. & P., and R. & G., and the assignees of M. M. to establish a lien on the proceeds of the ship, and on the cargo, under their agreement with M. M. The defendant R., one of the partners in the firms of R. & P. and R. & G., was alone within the jurisdiction, and served with the subpoena:—*Held*, that, in the absence of P., who appeared to be the registered owner of the ship, the Court could not make any decree establishing the plaintiffs' lien on the proceeds of the sale of the ship. *M'Calmont v. Rankin*, viii. 1

16. That, although it appeared by the result of an inquiry directed before the Master that the ship had been sold by R. & G. pending the suit, under the power of attorney from P., and that the proceeds had been accounted for by R. & G. to R. & P., no fraud being proved in the transactions under which those firms had acquired the ship and the proceeds, the plaintiffs were not entitled to any relief in respect of the proceeds of the sale, in the suit in which R. only appeared. *Ib.*

17. That the claim of the plaintiffs in equity to the proceeds of the ship would

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not be assisted by proof of notice by P. of the transactions between the plaintiffs and M. M. *Ib.*

18. No question arises as to the jurisdiction of this court in enforcing the rights of some against the other part owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship. *Darby v. Baines*, ix. 369

19. Powers and duties of the managing owners of a ship as between themselves and the other part owners. *Ib.*

20. Construction of an agreement entered into by the part owners of a ship, with regard to the management of the ship and the allowances for brokerage and commission. *Ib.*

21. On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—*Held*, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money. *Hughes v. Morris*, ix. 636

SHIPBROKER.

See SHIP.

SHIP REGISTRY ACTS.

See JURISDICTION.

1. There is nothing in the policy of the Ship Registry Acts to prevent a third party, not having any registered share in a ship, from acquiring from the owner an interest in the proceeds of the sale of the ship in the hands of a purchaser, when the ship shall have been sold, the Court not being required to recognise any interest in such third person in the ship itself—*semble*. *McCalmont v. Rankin*, viii. 1

2. But whether, under a contract by

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which a party has an interest in the proceeds of the sale of a ship, such party can compel the owner to sell the ship, or obtain a decree for the sale—*quære*. *Ib.*

SHORT CAUSE.

See APPENDIX, vol. x, p. lxxv.

SIGN MANUAL.

See CHARITY.

SIGNING THE REGISTRAR'S BOOK.

See APPENDIX, vol. ix, p. lxxxix.

SOLICITOR.

See COSTS—DISCOVERY—DISMISSAL OF BILL—LIEN—NOTICE—PARTNERSHIP—PAYMENT OF MONEY OUT OF COURT—PLAINTIFF—PRODUCTION OF DOCUMENTS—SUBSTITUTED SERVICE—TAXATION—TRUSTEE AND CESTUI QUE TRUST—WITNESS.

1. A solicitor, who prepared a deed of charge on behalf of the mortgagor and mortgagee, held to have notice of that incumbrance on the occasion of taking a subsequent mortgage of the same property to himself. *Perkins v. Bradley*, i. 219

2. The fact that a party,—knowing that his name has, without authority, been introduced as plaintiff by the solicitor of some of the other plaintiffs in a suit, does not take any active steps to have his name expunged as plaintiff from the record, is not, as between that party and the solicitor, equivalent to a retainer or an adoption of the latter as his solicitor. *Hall v. Laver*, i. 571

3. An executor who acts as solicitor in a cause, in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays:—*Held* entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive. *Burge v. Brutton*, ii. 373

4. An executor is not entitled to be allowed the costs of a suit in respect of the estate, prosecuted by a solicitor whom he did not employ: the solicitor himself is the party to apply for costs, as a lien on the fund which he has recovered. *Ib.*

5. The mother of an infant employed a solicitor to prosecute a suit on behalf of the infant. The person first named as next friend in the cause died; the mother subsequently discharged the solicitor, and after such discharge he amended the bill,

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and named a new next friend, without the mother's sanction. The Court ordered, that, on payment by the mother to the next friend of the costs incurred by him in the suit, the next friend should be removed and another appointed; and that the solicitor should pay the costs of the application, and of the new appointment. *Lander v. Ingersoll*, iv. 596.

6. Four plaintiffs instituted an original and two supplemental causes, and three of the same plaintiffs, on a subsequent abatement, filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last supplemental suit, and not the solicitor on the record in the first three causes, was held to be entitled to appear for the plaintiffs. *Ward v. Swift*, vi. 309.

7. The Order of the 18th October, 1842, is intended to substitute the solicitor for the six clerks, and not to give the solicitor a right to insist, as against his client, upon acting in the cause until removed by the order of the Court. *Ib.*

8. In an action on the case, against an attorney, for negligence, the Court held that the cause of action arose at the time the negligence occurred, and not at the time the negligence was discovered, or the consequential damages ensued. *Smith v. Fox*, vi. 386.

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See ASSIGNEES—CHAMPERTY—DISCOVERY — JOINT-STOCK COMPANY — LIEN — MORTGAGOR AND MORTGAGEE — PRODUCTION OF DOCUMENTS — PROFESSIONAL COMMUNICATION—SERVICE.

1. On a question of the propriety of a purchase by a solicitor from his client, the solicitor, in order to sustain the transaction, must, if he was solicitor *in hac re*, show that he gave his client all that reasonable advice against himself, which his office of solicitor would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative situation of the parties, and the equality of the footing upon which they stand, in reference to the subject of the contract; and, although the relationship of attorney and client may exist, yet, if it has no existence *in hac re*, the rule with regard to the onus of proof may no longer be applicable. *Edwards v. Meyrick*, ii. 60.

2. It appeared by the evidence, although it was not stated on the pleadings, that the value of the minerals in an estate purchased by the solicitor from his client was consi-

derably increased after the purchase, owing to a railroad, then contemplated, having been afterwards formed through the immediate neighbourhood:—*semble*, this was a merely speculative advantage, the communication of which to his client the solicitor would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it. *Ib.*

3. Purchase by a solicitor from his client sustained under the circumstances, though part of the consideration was made up of costs. *Ib.*

4. The solicitor, after the death of his client, retains his lien on the fund which he has recovered, and is not left merely to his rights as a general creditor on the estate of the client. *Lloyd v. Mason*, iv. 132.

5. The lien of the solicitor on the fund is not impeded by the fact, that the order of the Court directs the fund to be paid to the client, without reserving the right of the solicitor. *Ib.*

6. The solicitor of the plaintiff in a foreclosure suit, in which a decree for sale before the Master was made by consent, prosecuted the suit to the settlement of the particulars and conditions, and appointment of the day of sale, when the plaintiff and the defendant (by his solicitor), having notice of the claim of the plaintiff's solicitor for the costs of the suit, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, part of which sum was immediately paid to the plaintiff. Upon the petition of the plaintiff's solicitor, the Court ordered the costs of the plaintiff's solicitor in the suit to be taxed, and paid by the plaintiff and defendant, or one of them. *White v. Pearce*, vii. 276.

7. The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more than one bill of costs, if it appears that the second solicitor has, either before or after his retainer, agreed to allow his client, the first solicitor, a portion of the profits of his costs in the cause. *Deere v. Robinson*, vii. 283.

8. If, in the judgment of the Taxing-master, there be ground to suspect that an arrangement has been made between solicitors in the cause, by which a portion of the profits of the bill of costs of one is to be paid to another, it is in the discretion of the Taxing-master to require affidavits from the solicitors as evidence of the facts, and, if such an arrangement should appear, the bills of costs ought to be taxed as in case of agency. *Ib.*

9. A., B., and C. were defendants in the

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cause, against whom the bill was dismissed with costs. B. and C. acted as the solicitors of A., and appointed D. to act as their own solicitor in the same cause. After the retainer, an agreement was entered into between B. and D., whereby D. agreed to allow B. and C. a portion of the profits of his bill of costs:—*Held*, that the agreement constituted D., in substance, an agent for B. and C., and that the separate bills of cost of B., and of C. and D., were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency were properly disallowed. *Ib.*

10. A deed prepared by an attorney, and executed by his client, a young man who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, and appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, and for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, and insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, and that the deed was made and executed with the knowledge and authority of the client, and in order to prevent him from dissipating his property, but gave no evidence of such knowledge or authority:—The Court *held* that the burden of proof was upon the attorney, and set aside the deed, with costs to be paid by him. *Moore v. France*, ix. 299

11. A., who was an equitable mortgagee by deposit of deeds of property belonging to the estate of B., was paid off by C., on an agreement with the executors of B. (as their solicitor stated), that proceedings should be taken in A.'s name to enforce the mortgage security, and thereby to effect a sale of the whole or part of the mortgaged property; and the solicitor of the executors filed a claim for foreclosure in the name of A. against the representatives of B. A. denied that he had given authority to file the claim in his name, and moved that it might be taken off the file:—*Held*, that there being only assertion against assertion, and the solicitor alone stating that the instructions were given in the presence of A.,—the case was to be governed by *Allen v. Bone*, and the claim was dismissed, with costs, to be paid by the solicitor. *Crossley v. Crowther*, ix. 384

12. That, in such a case, the Court could not adjudicate between the solicitor, by whom the claim was filed, and the defendants, the representatives of B., by whom the instructions were given to file

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the claim in A.'s name; and the Court left the solicitor to any legal remedy he might have against such parties. *Ib.*

SON.

1. The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the Court can be guided in determining upon such intention. *East v. Twyford*, ix. 730

2. The question is, whether "son" or "sons" be used as nomen collectivum; upon which a subsequent limitation in favour of grandsons has an important bearing. *Ib.*

SPECIAL CASE.

See APPENDIX, vol. ix, p. lv.

SPECIAL CIRCUMSTANCES.

See APPENDIX, vol. ix, p. lvi.

SPECIFIC CHATTELS.

1. Bill for the delivery up of specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent. Demurrer by B. overruled. *Wood v. Rowcliffe*, iii. 304

2. Whether the jurisdiction to protect by injunction the possession, and decree the delivery up of specific chattels, is confined to chattels the loss or injury of which would not be adequately compensated in damages, or which it may not be possible specifically to replace—*quære*. *Ib.*

SPECIFIC LEGACY.

See CONVERSION—LEGACY.

SPECIFIC LEGATEE.

See LEGACY—PARTIES.

SPECIFIC PERFORMANCE.

See AGREEMENT—APPENDIX, vol. x, p. lvi — ASSIGNEES — CONSIDERATION — CONSTRUCTION — CONTRACT — COSTS — COPYHOLD — COVENANT — DECREE — DEMURRER — DISMISSAL OF BILL — EVIDENCE — EXCEPTIONS — JURISDICTION — LESSOR'S TITLE — MINES — MORTGAGE — AND MORTGAGEE — NOTICE — PARTIES —

SPECIFIC PERFORMANCE.

PARTNERSHIP—RENEWAL OF LEASE— TITLE—UNCERTAINTY—VENDOR AND PURCHASER.

1. The plaintiff was the lessee of a house and other premises for a term of thirty-one years, at a rent of £60, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of £9. The lessor of the house became the purchaser of the meadow; by the arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the plaintiff paying about half the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of £80 a year for the consolidated property:—*Held*, that the extension of the house into the meadow by the plaintiff, with the concurrence of his landlord, was evidence of, and was sufficient consideration for, a contract to demise the meadow. *Sutherland v. Briggs*, i. 26

2. That the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon. *Ib.*

3. That the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises. *Ib.*

4. That the doctrine with regard to the mutuality of contracts, had no application to such a case. *Ib.*

5. Lands were conveyed to a trustee, in trust to grant a lease of the mines under the same to certain persons for forty-two years, and at the request of the lessees, made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term; the first lease to contain a covenant for the renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for the renewal, which was refused. No proceedings were taken to enforce the performance of the covenant or trust for upwards of two years after the refusal:—*Held*, that so far as the title to renewal depended on the covenant, the delay or

acquiescence would be a defence in equity. *Walker v. Jeffreys*, i. 341

6. *Semble*—That the lessees had an equitable interest in the trust, which could not be divested by the delay alone; but that the lessees, in support of their title to a decree for performance of the trust, must show that they had, by performing the covenants on their part, paid the price for which, on the instruments, the lessors had stipulated. *Ib.*

7. The performance of the covenants by the lessees being doubtful, and the lessees declining to try issues as to that fact, the bill was dismissed with costs. *Ib.*

8. A bill for a landlord against his tenant for specific performance of an agreement for a lease to be taken by the latter, and an action by the landlord against the tenant for use and occupation of the premises during a part of the term:—*Held*, to be proceedings for the same matter, so far as the subject of the suits was co-extensive. *Ambrose v. Nott*, ii. 649

9. Several suits at law and in equity, to determine the title to certain lands, were pending between persons claiming to be mortgagees of such lands, and one who claimed the same lands in fee by title under a settlement paramount to the mortgage. The plaintiff, claiming to be a subsequent mortgagee of the same lands, contracted to purchase the interests of the prior mortgagees in their principal monies, arrears of interest, and securities, and to pay the purchase-money at certain stipulated times, all of which (except an annuity) were to be paid in 1843; and to pay and indemnify the prior mortgagees against the past and future costs of the suits and proceedings; and time was to be of the essence of the contract. The plaintiff did not pay the instalments until a considerable time after the stipulated period, but such later payments were accepted by the vendors. The bill, filed in 1845 (when some of the payments still remained to be made), alleged that the defendants refused to perform the agreement, and prayed a specific performance:—*Held*, on demurrer, that the plaintiff being interested, as second mortgagee, in the subject of the suits, the contract was not to be deemed champerty. *Hunter v. Daniel*, iv. 420

10. That, the defendants insisting upon their right to treat the agreement as void, the plaintiff was not bound to tender the unpaid instalments of the purchase-money before filing his bill. *Ib.*

11. That every default by the plaintiff in payment of the instalments at the stipulated time is a new breach of the contract, giving the defendants the right to rescind q q 2

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it; but that, to preserve such a right, it must be asserted immediately that the breach occurs; and that, in this case, the breach had been waived. *Ib.*

12. That, the time of performing the several acts required by the agreement on both sides being past, the Court would now enforce a contemporaneous performance of the contract by both parties. *Hunter v. Daniel,* iv. 420

13. Covenant, in February, 1841, by a municipal corporation to build a market forthwith. Bill, in September, 1843, for specific performance of the covenant. Answer, in December, 1843, stating that the corporation had not until recently determined for what goods the market should be adapted, and that the building should proceed with due diligence. At the hearing, in June, 1844, the cause was ordered to stand over for six months. In May, 1844, the corporation approved of the plan for the market, and in July, 1844, they met to consider the order in the cause, and subsequently built the market. The Court stayed all proceedings, without costs. *Price v. Corporation of Penzance,* iv. 506

14. A suit for specific performance of a contract was at the hearing ordered to stand over. The contract being afterwards performed, it was held to be regular for the plaintiff to bring before the Court, upon petition, the facts which had taken place subsequently to the answer. *Ib.*

15. Proceedings taken by defendants towards the fulfilment of a contract for the erection of a certain building, may enable the Court to decree a specific performance of the contract, in a case where, without such proceedings, it might have been difficult to define what would be a sufficient performance. *S. C.,* iv. 509

16. A father (tenant for life) and a son (tenant in tail), in 1831, joined in mortgaging the estate, to secure payment of a debt of the son, under an agreement between them to suffer a recovery, and re-settle the estate,—as to the remainder after the death of the tenant for life, in case the father should at any time be obliged to pay any part of the interest of the mortgage debt, or the son should not pay off that debt by a certain day, and the father should then pay it off and release the son therefrom, to the use of the father in fee; the father covenanting to convey or devise a seventh part of the estate to the son; and in case the son should pay off the mortgage by the time mentioned, then to the son and the heirs of his body, charged with £500 for such persons as the father should by deed or will appoint. The son did not pay off the mortgage debt, nor did the father pay it off, or release the son therefrom,

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but the father paid the interest until his death, in 1841, and after his death his devisees paid off the mortgage:—*Held*, that, neither party having performed the agreement, or apparently acted upon it, in the lifetime of the father, the Court would not, after the death of the father, enforce the specific performance of the agreement; nor would the Court, in such a case, enforce specific performance of an agreement, which, apparently, was an agreement for the sale of the son's reversionary interest in the estate at an undervalue. *Playford v. Playford,* iv. 546

17. That, as the agreement could not be specifically performed, the original rights of the parties remained; and the son was therefore entitled to redeem the estate, upon repayment of the mortgage debt and the interest. *Ib.*

18. A., B. and C. possessed of a manor, under an ecclesiastical lease, agreed with M. to grant him, upon the expiration of a subsisting grant, a copy of court-roll of a tenement holden of the manor, and entered into a joint and several bond to perform the contract. A. afterwards conveyed his interest in the manor to B., subject to the agreement with M., and died, having appointed the plaintiff his executor. The validity of the lease, constituting the title of B. and C. to the manor, was subsequently impeached; and pending the trial of their right to the manor, they were unable to grant the copy of court-roll according to the agreement. M. thereupon brought three several actions, upon the bond, against the plaintiff, B. and C., respectively. The plaintiff, B. and C., entered into a consolidation rule, whereby they all consented to be bound by the verdict in one of the actions. The plaintiff then filed his bill against B., C., and M., for a specific performance of the contract by B. and C., and to restrain the action brought by M.:—*Held*, that the question as against M. was the same both at law and in equity, and that after having consented to be bound by the verdict in the action, the plaintiff could not sustain the suit, and the bill was dismissed without prejudice to any question of contribution or indemnity as between the plaintiff, B. and C., the obligors in the bond. *Hole v. Pearce,* v. 408

19. A contract for the sale of the vendor's interest in a manor under a lease for lives, was made on the 16th of October, 1840. Objections were taken to the title, and a correspondence between the solicitors of the vendors and purchaser took place, and continued until the 20th of August, 1841, when the purchaser gave notice to the vendors that, the title being defective, he rescinded the contract. The correspondence

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with reference to the title still proceeded (the purchaser's solicitor claiming his right to insist upon the notice, but giving the vendors two months more to complete the title) until the 17th of January, 1842, when the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on the 30th of August, 1843:—*Held*, that the interval between the 20th of August, 1841, and the 17th of January, 1842, ought not to be regarded in the question of laches, but that the delay, after the 17th of January, 1842, before the bill was filed, precluded the vendors from sustaining their suit for specific performance. *Southcomb v. The Bishop of Exeter*, vi. 213

20. The fact that the purchaser allowed the deposit to remain in the possession of the vendor from the time he (the purchaser) declared the contract to be rescinded until shortly before the bill was filed, when he brought his action to recover it, did not affect the question of laches. *Ib.*

21. The possession of part of the property comprised in the contract, taken under a mutual arrangement, and in ignorance of the objection to the title which was afterwards discovered and relied on, did not affect the question of laches. *Ib.*

22. The tendency of the Court, in modern cases, has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which the plaintiff has been prompt in seeking his equitable remedy. *Ib.*

23. The purchaser being in possession of part of the property under the arrangement, and being advised to rescind the contract and assert his paramount title to the property, was not bound to give up the possession before he could assert such paramount title by making a formal entry on the property. *Ib.*

24. Specific performance of a partnership contract for an absolute term of years, leaving undefined the amount of the capital, and the manner in which it is to be provided, the mode of carrying on the business being discretionary,—cannot be enforced in a court of equity; and the Court, being unable to enforce the entire contract, will not enforce it in part, as against the representatives of a deceased partner, by refusing them a decree for the dissolution of the partnership and the sale of the property, which had, under the contract, been specifically devoted to the partnership business. *Downs v. Collins*, vi. 437

25. An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, and such revocation is valid against parties dealing without knowledge of it; therefore, in a suit by a

purchaser, to enforce specific performance of a contract entered into by the auctioneer by mistake or inadvertence, for the sale of property, as to part of which—a right of way over the land sold—his authority had been revoked, it is competent to the defendant to insist upon such revocation, and parol evidence is admissible in support of that defence. *Manser v. Back*, vi. 443

26. A party who has received notice from a railway company of their intention, in exercise of powers given by the Railway Act and the Lands Clauses Consolidation Act, to purchase his lands, may sustain a bill for specific performance of the agreement thereby created: and the Court will enforce such agreement by ordering the Company to take the proceedings prescribed by the statute for ascertaining the amount of purchase-money and compensation. *Walker v. Eastern Counties Railway Company*, vi. 594

27. To a bill by the covenantor for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment-creditors of the tenant in tail, whose debts have been made charges on his estate under the statute 1 & 2 Vict. c. 110, are not necessary parties. *Petre v. Duncombe*, vii. 24

28. A purchaser of lands under the description of "partly freehold and partly leasehold," is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of title, or shown to be capable of being so defined; but the circumstance, that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance. *Monro v. Taylor*, viii. 51

29. The uncertainty in the boundary or extent of property, which arises, not from an instrument being incapable of legal construction, but from its not having theretofore received any such legal construction, is not a ground for refusing specific performance of a contract to sell such property. *Ib.*

30. Although a good title was not shown by the vendor until during the pendency of the reference, the Court held that the purchaser must nevertheless bear the costs of the suit, it being manifest, that, if the particular evidence which completed the title had been produced before the bill was filed, yet the suit would not have been avoided. *Ib.*

31. Consideration of the principle on which the Court may, in certain cases, in-

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terpose to prevent a contract from being performed in specie,—protecting the legal or supposed legal right of the party seeking such assistance, and preserving to the other party the substantial benefit of the specific performance. *The East Lancashire Railway Company v. Hattersley*, viii. 72

32. Effect of an agreement for a reference to arbitration of a dispute between a vendor and purchaser as to certain terms, or alleged terms, of the contract, and of an award thereupon, in a suit subsequently instituted for the specific performance of the contract. *Clay v. Rufford*, viii. 290

33. The Court, upon a petition to enforce an agreement entered into by the parties to the cause, after the cause was at issue, to compromise the suit, refused to dismiss the bill, or to stay the proceedings in the cause. *Askew v. Millington*, ix. 65

34. The proper proceeding to enforce an agreement for the compromise of a suit, where such agreement goes beyond the ordinary range of the Court in such suit, or where the Court has, in enforcing the agreement, to adjudicate on equities distinct from the equity appearing on the record in the cause, is, by bill for specific performance, and not by interlocutory application in the existing cause—*semble*. *Ib.*

35. A contract entered into by the promoters of a railway company with a landowner, to pay a certain sum for the portion of his lands to be taken for the intended railway and for consequential damage, in consideration of which agreement the landowner withdrew his opposition to the bill:—*Held*, to be binding, although, after the passing of the Act, the intention of making the railway be abandoned, and no part of the land be taken or required. *Webb v. The Direct London and Portsmouth Railway Company*, ix. 129

36. Specific performance decreed of an agreement to pay, for the lands to be taken for a railway, a certain sum, which included not only the purchase-money of the lands, but compensation for the consequential damage to the property of the landowner; the case not being one in which a compensation was under the Act a distinct subject of contract, but being merely an agreement by the landowner to accept a sum in full for the purchase and damage; the purchase being the substance of the agreement, and the damage an incident. *Ib.*

37. The fact that the railway company had, by the lapse of time, lost the powers which the legislature had given them to take lands, did not deprive them of the right to hold lands which they had acquired during the existence of their powers, nor did it release them from their obligations

which they had then contracted with reference to the purchase of land. *Ib.*

38. The fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made—*semble*. *Ib.*

39. A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any custom in the manor, or license from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber. *Cross v. Keene*, ix. 469

40. On a vendor's bill for specific performance, the opinion of the Court was much in favour of the title, the question on which turned on the construction of a particular will; but the Court, being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance. *Pyrke v. Waddingham*, x. 1

41. A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded. *Ib.*

42. If the doubts as to a title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused. *Ib.*

43. The rule rests upon the principle that every purchaser is entitled to require a marketable title. *Ib.*

44. It is the duty of the Court, on questions of title depending on the possibility

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of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

45. A marketable title is a title which, at all times, and under all circumstances, may be forced upon an unwilling purchaser. *S. C.*, x. 8

46. The Court refused to enforce specific performance of an agreement for a mere tenancy from year to year. *Clayton v. Hillingworth*, x. 451

47. The decision in the case of *Edwards v. The Grand Junction Railway Company* did not proceed on the principle that the incorporated company was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; and, in the absence of any adoption of the contract of such a party by the incorporated company, or of any attempt to exercise the powers thereby acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated company; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will, in that case, not only negatively but positively, interpose and compel the performance by them of every portion of the contract. *The Earl of Lindsey v. The Great Northern Railway Company*, x. 679

48. A railway company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the company required for the railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—*Held*, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for the specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs. *South-Eastern Railway Company v. Knott*, x. 22

49. The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct; and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right. *Ib.*

50. The particulars of sale (erroneously, but without any fraud) described a part of

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the property as customary leasehold, holden of a certain manor, and renewable every twenty-one years at a customary fine, and an annual rent of 10s. This property proved to be holden only for the residue of a lease for twenty-one years, at a rent of 10s., without any customary right of renewal. One of the conditions of sale fixed the time at which any objections to the title of the vendor should be taken, and enabled him, at any time after the delivery of such objections, to vacate the sale. Another condition provided, that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to the leasehold property; and a further condition stipulated, that if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in the particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser should allow or pay compensation. Upon a bill by the purchaser against the vendor:—*Held*, that the purchaser was entitled to specific performance of the contract, with compensation for the absence of any customary right of renewal, the same being a misstatement or misdescription within the last-mentioned condition. *Painter v. Newby*, xi. 26

51. That the power reserved to the vendor of vacating the sale must be construed to apply only to a case of dispute arising upon an objection of title. *Ib.*

52. That the claim of the purchaser for compensation, in respect of the absence of any customary right to renew the lease, was not an objection to the title, within the meaning of the particulars and conditions of sale. *Ib.*

STAKEHOLDER.

See INTERPLEADER.

STAMP.

See APPENDIX, vol. ix, pp. lvii, xc.

1. An order signed by A., addressed to his bankers, directing them, out of the balance due to him on the final arrangement of his account, to pay to B. a certain sum; and which order was forthwith placed in the hands of B., who, accompanied by A., immediately proceeded to the banking-house, and delivered it to the bankers:—*Held* to be an instrument requiring a bill stamp within the statute 55 Geo. 3, c. 184. *Parsons v. Middleton*, vi. 261

2. *Held*, also, that although the intention of A. and B. was that the order should be forthwith delivered to the bankers, yet the

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fact that the order was, according to the agreement, delivered by A. to B. (the payee), brought it within the provisions of the Stamp Act applicable to an instrument of that character. *Ib.*

3. That the agreement (according to which the order was made) to give B. a lien on the property of A. in the hands of the bankers, consisting of various shares and securities on which the bankers had a prior charge for the amount of the advances made by them to A., could not be established as separate from and independent of the order, treating the order merely as a notice of the agreement given to the bankers, but that the agreement must be regarded as giving B. only such a lien (if any) as the order created. *Ib.*

STATE OF FACTS.

See STATUTES, CONSTRUCTION OF, § 4 Will. 4, c. 27.

STATION.

See RAILWAY COMPANY.

STATUTES (PUBLIC).

See PROLIXITY.

STATUTES, CONSTRUCTION OF.

37 HEN. 8, c. 12—See TITHES.

13 ELIZ. c. 5—See DEBTOR AND CREDITOR—PRO INTERESSE SUO.

Whether, after the bankruptcy or insolvency of a debtor, any creditor (other than the assignees) can, in ordinary cases, sustain a suit to set aside a conveyance made by the debtor prior to the bankruptcy or insolvency, on the ground that such conveyance is fraudulent, within the statute 13 Eliz. c. 5; or whether it is necessary that any creditor seeking to set aside such fraudulent conveyance must previously recover judgment at law for his debt—*quære*. *Lister v. Turner*, v. 281

27 ELIZ. c. 4—See CHARITABLE TRUST OR USE—CONSIDERATION—DEBTOR AND CREDITOR—EQUITABLE MORTGAGE—VOLUNTARY DEED.

3 JAC. 1, c. 4, ss. 22, 23—See ALIEN.

21 JAC. 1, c. 3 (*Monopolies*)—See PATENT.

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21 JAC. 1, c. 16 (*Limitation*)—See CREDITORS' SUIT—DEBTOR AND CREDITOR—EQUITABLE SET-OFF—EVIDENCE—PARTNERSHIP.

— s. 3—See PARTNERSHIP.

Where a promissory note was made payable at a certain time after sight, with interest thereon, and the interest was duly paid for several years (as the bill alleged), the Court held, that the note must be taken to have been acted upon according to its form and tenour; and, therefore, that the presentment for sight must have been duly made before the interest was paid; and that the payment became due upon the note at the prescribed date after such presentment, and that the Statute of Limitations would begin to run from the time the payment so became due. *Way v. Bassett*, v. 55

29 CAR. 2, c. 3 (*Frauds*), s. 4.—See PARTNERSHIP.

3 WILL. & M. c. 14 (*Fraudulent Devises*)—See COVENANT.

9 & 10 WILL. 3, c. 15—See AWARD.

7 ANNE, c. 20.

A conveyance of lands in Middlesex by settlement upon the marriage of the settlor, registered under the statute 7 Anne, c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. *Elsev v. Lutyens*, viii. 159

4 GEO. 2, c. 21—See ALIEN.

4 GEO. 2, c. 28.

A lessee applying to redeem a lease, which has become forfeited at law by non-payment of rent, is not required by the statute 4 Geo. 2, c. 28, s. 3, before the hearing, to pay into Court the arrears of rent or the costs at law, if no injunction is granted until the hearing, and the lessor is in possession. *Bowser v. Colby*, i. 109

7 GEO. 2, c. 20, s. 2—See FORECLOSURE—MORTGAGOR AND MORTGAGEE.

9 GEO. 2, c. 36—See ADMINISTRATION SUIT—CHARITABLE TRUST OR USE—CHARITY—MORTMAIN ACT.

1. Arrears of rent due to a testator at his decease are not within the restriction of the 9 Geo. 2, c. 36, but will pass under

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a bequest for charitable uses. *Edwards v. Hall*, xi. 6

2. In determining a question of the validity of a bequest attempting to create a charitable trust, with reference to the stat. 9 Geo. 2, c. 36, the construction of the gift, and the manner in which the trust ought to be executed, are first to be determined without regard to the operation of the statute; and then it is to be seen whether the statute interposes a bar to the creation or due execution of such a trust. *S. C.*, xi. 16

13 GEO. 3, c. 21.—See ALIEN.

39 & 40 GEO. 3, c. 98 (*Thelluson Act*)—
See ACCUMULATION.

1. Whether by the statute it is not meant to protect accumulations for portions to be paid out of the fund so accumulated, and not out of the whole fund—*quære*. *Burt v. Sturt*, x. 424

2. The exception as to portions does not apply exclusively to portions created by antecedent instruments. *Viscount Barrington v. Liddell*, x. 431

3. The conveyances, settlements, and devises, and the particular interests of the parents of children taking portions to which the statute refers. *S. C.*, x. 432

4. The antecedent referred to by the word "such" conveyance, &c., in the 2nd section of the *Thelluson Act*. *S. C.*, x. 434

5. A provision for payment of the debts of "other person or persons," held, not to refer to the debts of any person or persons, but only of the person or persons directing the accumulation to be made. *Ib.*

6. The parent must take an interest in the real or personal estate the income of which is directed to be accumulated, to bring the case within the exception. *S. C.*, x. 435

41 GEO. 3, c. 107, s. 1.

54 GEO. 3, c. 156, s. 4.

Whether a court of equity is a court of record within the meaning of the statutes 41 Geo. 3, c. 107, s. 1, or 54 Geo. 3, c. 156, s. 4—*quære*. *Colburn v. Simms*, iii. 543

52 GEO. 3, c. 101 (*Sir Samuel Romilly's Act*)—See APPENDIX, vol. x, pp. xxxvii, xxxviii—CHARITY—CHURCHWARDEN.

53 GEO. 3, c. 141—See ANNUITANT.

54 GEO. 3, c. 173; 57 GEO. 3, c. 100—
See LAND-TAX REDEMPTION.

55 GEO. 3, c. 184 (*Stamp Act*)—See
STAMP.

56 GEO. 3, c. 60—See PARTIES—PLEADING.

1 GEO. 4, c. 119, s. 7—See INSOLVENT
DEBTOR.

1 & 2 GEO. 4, c. 92.

The Commissioners appointed under the stat. 1 & 2 Geo. 4, c. 92, and the Bishop, having found that an exchange of the charity lands would be beneficial, and the same having been effected according to the statute, the Court has no power to reverse their decision; and it is immaterial that the Bishop was himself one of the trustees of the charity, the Bishop having no personal interest in the property. *Attorney-General v. The Bishop of Worcester*, ix. 328

4 GEO. 4, c. 76, s. 23—See DISCOVERY.

7 GEO. 4, c. 57, s. 20—See INSOLVENT
DEBTOR.

9 GEO. 4, c. 14; 3 & 4 WILL. 4, c. 27
(*Statutes of Limitations*)—See DEBTOR
AND CREDITOR.

1 WILL. 4, c. 36.

The Orders of May, 1845, do not take away the right of proceeding upon contempt, to take the bill pro confesso under the statute 1 Will. 4, c. 36. *Wilkin v. Nainby*, iv. 476

Id., Rule II.—See PRO CONFESSO.

Where a defendant, who is in custody for contempt for not answering the bill, has been brought up and remanded, under the stat. 1 Will. 4, c. 36, s. 15, the two months and six weeks, given by the 18th rule, is not interrupted by, but will run in, the vacation, although, if the thirty days allowed by the 5th rule, for first bringing the defendant up after he is actually in custody, should expire in vacation, that time is extended to include the four first days of the following term. *Simmons v. Wood*, ii. 644

Id., Rule V.

The stat. 1 Will. 4, c. 36, s. 15, rule 5, does not make it imperative upon the plaintiff to bring a defendant, who is in custody, up to the bar of the Court within thirty days, but only deprives the plaintiff of the benefit of his process, and entitles the defendant to his discharge, if the plaintiff does not bring him up. *Woodwards v. Conebeer*, i. 297

1. WILL. 4, c. 60—See MORTGAGOR AND
MORTGAGEE—TRUSTEE.

I. Three trustees, two of whom were

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creditors of A., joined in making promissory notes for securing to the other creditors of A. a composition on their respective debts, and took a conveyance and assignment of the real and personal estate of A., upon trust, after paying the costs and charges, to indemnify the three trustees in respect of the promissory notes, and then to pay the two trustees, who were creditors, a like composition on their respective debts, and to pay the surplus to A. After two of the trustees had received part of the personal estate of A., and had paid the promissory notes to a larger amount than they had received, the other trustee (who was one of the creditors) went out of the jurisdiction of the Court. There was no power in the deed to appoint new trustees:—*Held*, on the petition of the two trustees, that the trustee out of the jurisdiction was a trustee within the Act of 1 Will. 4, c. 60, for the petitioners and himself, and the Court, without directing a bill to be filed, appointed another trustee in his stead. *In re George Ryley*, iii. 614

2. An order of reference to inquire whether the heir of the mortgagee was a trustee within the Act 1 Will. 4, c. 60, and 1 & 2 Vict. c. 69, was made upon the petition of the executors of the mortgagee, and, the mortgage debt being paid off pending the reference, the Master found that the heir was not a trustee for the petitioners, but for the mortgagee; whereupon the Court allowed the petition to be amended and made the petition of the mortgagee, and then directed the reconveyance. *In re Manifold*, iv. 308

3. Where the Master finds, that, in a certain construction of a devise, the infant therein named is a trustee within the Act 1 Will. 4, c. 60, but that, on a different construction, another person would be such trustee, the Court may declare the infant to be the trustee, and make the order for conveyance without sending the case back to the Master. *Langford v. Auger*, iv. 313

4. After a decree in a creditors' suit for the sale of the real estate of the testator, and the application of the proceeds in payment of the debt, and after a sale under that decree, the devisees of the estate, being lunatic or out of the jurisdiction, are trustees of the estate, within the statute 1 Will. 4, c. 60, for the plaintiff in the cause—*semble*. *Jackson v. Milfield*, v. 538

5. If the devisees in such a case are not trustees for the plaintiff, by the effect of the decree, the Court cannot make them such trustees by any declaration to that effect; and if the devisees are such trustees by the effect of the decree, an express declaration thereof (if necessary) should be

made by decree, and cannot properly be made upon petition. *Ib.*

1 WILL. 4, c. 60, s. 23.

By an indenture of 1634, a rent charge was granted to certain trustees for charitable uses, and, the last survivor of such trustees being unknown, the Court, under the statute 1 Will. 4, c. 60, s. 23, on the petition of the persons who administered the charity before the rent charge ceased to be paid, appointed new trustees, and a person to convey the rent charge to such trustees. *In re 1 Will. 4, c. 60*, and *In re Nightingale's Charity*, iii. 336

2 WILL. 4, c. 33—See JURISDICTION.

2 & 3 WILL. 4, c. 100.

The statute 2 & 3 Will. 4, c. 100, brings down the period of legal memory from the time of 1 Ric. 1 to the time of the commencement of two incumbencies (not being together less than sixty years), and three years of a third incumbency; but does not create a new ground of exemption, or destroy the right to tithes upon mere proof of non-payment or non-render during two such incumbencies and three years of a third, in cases where proof of non-payment or non-render from the time of 1 Ric. 1 would, before the statute 2 & 3 Will. 4, c. 100, have established no exemption. *Salkeld v. Johnston*, i. 196

3 & 4 WILL. 4, c. 74—See HUSBAND AND WIFE.

3 & 4 WILL. 4, c. xlv (London and Greenwich Railway Act)—See COSTS.

3 & 4 WILL. 4, c. 104—See ESCHREAT.

1. Where a person dies seized of land which he has not by will charged with his debts, the statute 3 & 4 Will. 4, c. 104, makes the lands themselves, and not merely the estate or interest of such person in the lands, assets for the payment of his debts. *Viscount Downe v. Morris*, iii. 399

2. A general devise and bequest of the testator's real and personal estate to A. for life, and, after the decease of A., a devise of certain copyholds to B., and a direction that, on the decease of B., the copyholds should be sold, with a gift of the monies arising by such sale amongst persons of certain classes who should be living at the death of B., share and share alike:—*Held*, that the executors would not be necessary parties, on the mere ground that the copyhold estate is by statute made assets to be administered in equity for the payment of debts—*semble*. *Curtis v. Fulbrook*, viii. 25, 278

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4 WILL. 4, c. 23.

Under the Escheat Act, trust monies may be followed into land against the lords of the fee; and if it were otherwise, the estate in the hands of the lord by escheat is liable to the debts of the person whose estate has escheated. *Hughes v. Wells*, ix. 749

3 & 4 WILL. 4, c. 27 (Limitations)—

See ADVERSE POSSESSION.

1. A. T., a person of unsound mind, living in the family of M. D., became entitled as heiress-at-law to certain lands. M. D. received the rents and profits of such lands for thirteen years during the life of A. T., and eleven years after her death, when M. D. died. M. D. had procured A. T. to execute a will devising part of her estate, and also indentures for conveying other parts to M. D. and her heirs:—*Held*, that procuring instruments of conveyance and devise to be executed by a person of unsound mind was a fraud within the stat. 3 & 4 Will. 4, c. 27, s. 26. *Lewis v. Thomas*, iii. 26

2. *Semble*, that, after issues had been directed, on motion, to try the validity of the instruments executed by A. T., and whether she was of sound mind, the order being submitted to, it was no longer open to those claiming under M. D. to insist, at the hearing, that the claim of the heirs of A. T. was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Ib.*

3. On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor, a receiver was appointed, and, at the hearing, a reference as to incumbrances on the estate was directed. A state of facts and claim carried in before the Master under such inquiry by an incumbrancer, not a party to the suit, was held to take the charge as to the interest out of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 42); and the incumbrancer was held to be entitled to arrears of interest for six years antecedent to the time of such claim. *Greenway v. Bromfield, Handley v. Wood*, ix. 201

4. A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the Master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir-at-law of the lunatic, who was not a party to the application. *Wilkinson v. Wilkinson*, ix. 204

Id., ss. 2, 3, 25, 42.

1. The testator gave an annuity to A., and charged the same upon all his freehold and leasehold estate. He afterwards devised his freehold estates to trustees (who were also his executors), upon trust (subject to the charge) to and for the use of his grandson and his heirs. The trustees, being in possession of the estates, paid the annuity to A. during the minority of the grandson, and within twenty years before the filing of the bill by A. against the grandson:—*Held*, that such payment of the annuity by the trustees prevented the claim of A. to the annuity from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 2, 3. *Francis v. Grover*, v. 39

2. That the grandson was not a trustee for the annuitant within the 25th section of the statute 3 & 4 Will. 4, c. 27, or otherwise; and that, under the 42nd section of the same statute, the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill. *Ib.*

Id., s. 25—See CHARITABLE TRUST OR USE—TRUSTEE AND CESTUI QUE TRUST.

Id., s. 28—See ADVERSE POSSESSION—MORTGAGOR AND MORTGAGEE.

Id., s. 40.

A contract for the sale of an estate was made in March, 1811, the agreement being that the purchase-money should be paid on the 13th of May following; and the purchaser was let into possession immediately on the execution of the contract. The purchase-money was not paid; but the purchaser, and persons claiming under him, continued in possession. In 1844, the assignees of the vendor filed their bill, claiming a lien on the estate for the purchase-money and interest from the day fixed for the completion of the contract:—*Held*, that the right of the vendor to recover the purchase-money, as a lien or charge upon the land, was barred by the 40th section of the statute 3 & 4 Will. 4, c. 27. *Toft v. Stephenson*, vii. 1

Id., s. 42—See ANNUITY.

3 & 4 WILL. 4, c. 27, s. 42; c. 42, s. 3—See MORTGAGE.

4 & 5 WILL. 4, c. 22.

The statute 4 & 5 Will. 4, c. 22, for the apportionment of rents and other periodical payments, applies to cases in which the interest of the person interested in such rents and payments is terminated by his death or by the death of another person, but does not apply to the case of a tenant in

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fee, or provide for apportionment of rent between the real and personal representative of such person whose interest is not terminated at his death. *Browne v. Amyot*, iii. 173

4 & 5 WILL. 4, c. 82.—See JURISDICTION—SERVICE.

6 & 7 WILL. 4, c. 32.—See BUILDING SOCIETY.

7 WILL. 4 & 1 VICT. c. 26 (*Wills*)—See DEVISE—MINES.

Id., s. 15.—See LEGACY.

Id., ss. 21, 34.—See WILL.

Id., ss. 3, 24, 33.

The 33rd section of the stat. 1 Vict. c. 26, which provides, that, where a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator leaving issue, and any such issue shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of the testator, does not substitute for the pre-deceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the pre-deceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator. *Johnson v. Johnson*, iii. 157

Id., s. 25.—See VOID DEVISE.

The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. *In re Mores' Trust*, vii 178

Id. s. 33.

A testator, by a will made since the Wills Act (7 Will. 4 & 1 Vict. c. 26), gave to his son a residuary share of his estate. The son died after the Act came into operation, and before the date of the will, leaving children :—*Held*, that, under sect. 33 of the Wills Act, the gift took effect, although, according to the law prior to the statute there would have been no effectual devise or bequest. *Mower v. Orr*, vii. 473

7 WILL. 4 & 1 VICT. c. 26, ss. 33, 34.

1. By a deed, made since the Statute of Wills (7 Will. 4 & 1 Vict. c. 26), certain trust funds were appointed to trustees, in trust for such person or persons, for such interest or interests, and chargeable with such sum or sums of money, and for such intents and purposes, and in such manner, in all respects, as the appointor should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint. The appointor afterwards made her will (which was duly executed and attested according to the Statute of Wills), and thereby bequeathed part of the trust funds :—*Held*, that the will was a writing within the terms of the power. *Buckell v. Blankhorn*, v. 131

2. The testator, by a will made before the Wills Act (7 Will. 4 & 1 Vict. c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate. The son died after the Wills Act came into operation, leaving issue ; and after his death, the testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will :—*Held*, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir at law of the son, and so far as it was personal, to his executrix, under a will made before the Wills Act came into operation. *Winter v. Winter*, v. 306

3. That, under the 34th section of the Wills Act, the effect of the republication of the will by the codicil was the same as if the testator had at the date of the codicil made a will in the words of the will so republished. *Ib.*

1 & 2 VICT. c. 69.—See *Supra*, 1 WILL. 4. c. 60.

1 & 2 VICT. c. 110 (*Insolvent Act*)—See ALIENATION—COSTS.

Id., s. 13.—See DEBTOR AND CREDITOR.

Id., ss. 14, 15.

1. After the order, obtained by a judgment creditor, for charging the interest of his debtor in government stock, standing in the name of trustees, has been made absolute, under the statute 1 & 2 Vict. c. 110, s. 15, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them ; and

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the trustees are to apply the dividends according to the equitable interests of the parties. *Bristed v. Wilkins*, iii. 235

2. *Semble*, a judgment creditor who has obtained an order charging the interest of his debtor in government stock may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstanding the six months prescribed by the statute 1 & 2 Vict. c. 110, s. 14, have not expired. *Ib.*

Id., ss. 16, 18—See COSTS.

Id., s. 47—See INSOLVENT DEBTOR.

Id., s. 68—See MORTGAGOR AND MORTGAGEE.

2 & 3 VICT. c. 54—See NEXT FRIEND.

5 VICT. c. 5, s. 4.

The order,—which under the Act 5 Vict. c. 5, s. 4, may be issued upon motion or petition without bill filed, to restrain the Bank or any public company from permitting the transfer of stock or shares, or the payment of dividends,—cannot be continued after time has been afforded for filing a bill, and no bill has been filed. *In re The Marquis of Hertford*, i. 584

Id., s. 5.

A party who has obtained a distringas, under s. 5 of the Act 5 Vict. c. 5, may notwithstanding, in a proper case of merits and urgency, obtain a restraining order under s. 4. *Ib.*

5 & 6 VICT. c. 39—See AGENT.

5 & 6 VICT. c. 116—See INSOLVENT DEBTOR.

6 & 7 VICT. c. 85—See WITNESS.

7 & 8 VICT. c. 45.

Proof of twenty-five years' usage of a Dissenters' meeting-house for worship by persons of a certain religious society, is not, under the stat. 7 & 8 Vict. c. 45, conclusive evidence that the trusts of the premises are for the benefit of that society, where such trusts are declared upon the face of the deed by which the premises are dedicated to the charitable use, although such deed, not being enrolled, is "to all intents and purposes null and void" under the Mortmain Act. *Attorney-General v. Ward*, vi. 483

7 & 8 VICT. c. 70.

1. The 8th section of the stat. 7 & 8 593

Vict. c. 70, "for facilitating arrangements between debtors and creditors," which enacts, that, upon the filing of the resolution and agreement therein mentioned, all the estate and effects of the petitioning debtor shall vest in the trustee (if any be appointed) as fully as if such trustee were an assignee in bankruptcy, has not necessarily the effect of vesting in the trustee all the estate and effects of the petitioning debtor, but vests only so much of such estate and effects as the debtor may give up and the creditors accept, or that part of the estate and effects in respect of which the trustee is appointed. *Robins v. Hobbs*, ix. 122

2. The second meeting of creditors convened under the 4th section of the Act may accept or reject, but cannot vary, the terms of the agreement assented to by the first meeting—*semble*. *Ib.*

8 & 9 VICT. c. 18 (*Lands Clauses Consolidation*).

1. All the lands of a municipal corporation are held "upon the same or the like uses, trusts, or purposes," within the sect. 69 of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), so that money paid for the compulsory purchase of one part of the lands of a municipal corporation may be applied in the redemption of an incumbrance upon another part of the lands of the same corporation. *Ex parte The Corporation of Cambridge, in re The Eastern Counties Railway Company*, vi. 30

2. A railway company, having given notice of their intention to purchase lands for the undertaking, deposited the purchase-money, and delivered the bond (according to the provisions of the 85th section of the Lands Clauses Consolidation Act) before the expiration of the period prescribed for the exercise of their compulsory powers; neither their power to purchase the land, nor their power to enter, is gone by the subsequent expiration of that period. *Sparrow v. The Oxford, Worcester and Wolverhampton Railway Company*, ix. 436

3. The powers for the compulsory purchase and taking of lands referred to in the 123rd section of the Lands Clauses Consolidation Act, are powers given to the several promoters of the several special Acts in which that Act might be incorporated, and not several powers given to the promoters of each special Act. *Ib.*

4. The 123rd section of the Lands Clauses Consolidation Act refers to the powers given by the Act for the purchase and taking of land; but not to the powers thereby given for carrying into effect a purchase already made. *Ib.*

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5. Powers under the head of the purchase and taking of lands distinguished into those strictly for that purpose, and those which are powers for carrying into effect a purchase already made. *S. C.*, ix. 445

6. The clauses 58 to 67 of the Lands Clauses Consolidation Act refer to lands which may more properly be said to be taken than purchased. *Ib.*

7. Where there is no original equity affecting the claim of a party to compensation under the 68th section of the Lands Clauses Consolidation Act, in respect of lands injuriously affected, the statute does not create such an equity, but where there is an original equity affecting the claim, the statute does not take it away. *Duke of Norfolk v. Tennant*, ix. 745

8. Where, therefore, an agreement for such compensation has been completed and carried out, and the satisfaction perfected, there is no ground for the interference of the Court, arising out of the provision of the statute; but where the defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, and a case for specific performance arises, there is nothing in the statute to exclude the interposition of the Court. *Ib.*

9. The Court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act, from prosecuting their claim under the Act, upon the mere ground that the Act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not; but whether the same rule applies to a case in which there are several grounds of claim, some of which have been satisfied—*quære. Ib.*

Id., s. 18.

A railway company, empowered to take lands for the purposes of the undertaking, is not restricted by the Lands Clauses Consolidation Act to one notice, but may, after a notice for taking certain lands, give a further notice for taking other lands within the prescribed limits,—such additional lands being necessary for the works. *Stamps v. The Birmingham, Wolverhampton, and Stour Valley Railway Company*, vii. 251

Id., s. 84.

A railway company, having power to purchase a plot of land for their railway, entered upon the same to survey and take levels thereof, and probe or bore to ascertain the nature of the soil, and set out the centre line of the railway; and for that purpose they dug a trig line or trench two

inches deep and fourteen inches wide across the plot of land, but they gave the owner of the land no previous notice of such entry as required by the 84th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18). Five days after the trig line was made, the owner of the land discovered the fact, and nine days from such discovery he filed his bill for an injunction. Upon the affidavits on the part of the company, that the surveying and setting out of the line of railway was completed on the day the trig line was made, and that they had no occasion to enter and did not intend again to enter upon the land until they had taken the legal steps for permanently using it, the Court refused the injunction, but reserved the costs. *Fooks v. Wills, Somerset, and Weymouth Railway Company*, v. 199

Id., s. 85.

The proceedings under the 85th section of the Lands Clauses Consolidation Act are not necessarily invalid because the award was signed on a day subsequent to the day on which the money was paid into Court, and the bond given. *S. C.*, vii. 256

8 & 9 VICT. c. 20 (*Railways Clauses Consolidation Act*).

Whether the 92nd section of the Railways Clauses Consolidation Act does or does not convert railways into public highways; and whether that section be or be not controlled by the 87th section of the same Act, giving powers to companies to enter into agreements as to passing over or along each other's lines; yet, when an agreement as to the terms of passing over or along each other's lines has been entered into between railway companies, their rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the provisions of the Railways Clauses Consolidation Act. *The Great Northern Railway Co. v. The Eastern Counties Railway Co.*, ix. 306

Id., ss. 3, 87, 92, 115—*See RAILWAY COMPANY.*

Id., s. 6.

In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands, or upon the lands of another party, and for which damage compensation is required to be made by s. 6 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same

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is ascertained, paid, or deposited. *Hutton v. The London and South-Western Railway Company*, vii. 259

8 & 9 VICT. c. 105, s. 2—See JURISDICTION.

9 & 10 VICT. c. 73, s. 19—See TITHE.

The words "every instrument" in sect. 19 of the Tithe Commutation Amendment Act, 9 & 10 Vict. c. 73, cannot be read as "every such instrument." *Walker v. Bentley*, ix. 633

10 & 11 VICT. c. 96—See TRUSTEE AND CESTUI QUE TRUST.

A trustee paying into Court a sum of money under the Trustee Relief Act, (10 & 11 Vict. c. 96), although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in; and after such payment the parties beneficially interested can proceed only under the Act to recover the money so paid in; and the ordinary jurisdiction of the Court, as against the trustee, is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment. *Goode v. West*, ix. 378

11 & 12 VICT. c. 45—See JOINT STOCK COMPANY.

1. The official manager, prosecuting, under the 53rd section of the 11 & 12 Vict. c. 45, a suit previously commenced, can have no better right than the original plaintiff had, but must adopt the suit with all its imperfections and infirmities, and can only make such amendment in it as the state of the cause would have allowed the original plaintiff to make. *Official Manager of the Grand Trunk &c., Railway Company v. Brodie*, ix. 825

2. Whether a suit can, under the Winding-up Act 11 & 12 Vict. c. 45, s. 53, be brought on behalf of all the shareholders except the defendants, or otherwise than on behalf of the entire Company—*quære*, *Ib.*

12 & 13 VICT. c. 106, s. 130 (*Bankrupt Law Consolidation Act*)—See TRUSTEE AND CESTUI QUE TRUST.

13 & 14 VICT. c. 35, s. 14.

Questions on which it is proper for the Court of Chancery to send cases for the opinion of Courts of common law, or to seek the assistance of the judges of such Courts, under the statutes 13 & 14 Vict. c. 35, s. 14; and 14 & 15 Vict. c. 83, s. 8, or otherwise. *Falkner v. Grace*, ix. 280

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STAY OF EXECUTION.

Id., s. 28

Affidavits admitted at the hearing, under the stat. 13 & 14 Vict. c. 35, s. 28, as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment. *Devey v. Thornton*, ix. 233

13 & 14 VICT. c. 60 (*Trustee Act*, 1850).

Two partners in a brewery, part of the property of which consisted of freehold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership, at a valuation; and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which his share was valued. The share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act, 1850, without suit, to declare the infant heir a trustee for the surviving partner. *In re William Henry Burt, an Infant, and of the Trustee Act*, 1850. ix. 280

13 & 14 VICT. c. 83, s. 60 (*Trustee Act*, 1850).

On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the Court, under the Trustee Act, 1850,—the mortgage debt remaining unpaid,—made an order vesting the mortgage estate in such executors, subject to the equity of redemption. *In the matter of Boden's Estate, and of the Trustee Act*, 1850, ix. 820

14 & 15 VICT. c. 83, s. 8—See *supra*, 13 & 14 VICT. c. 35, s. 14.

14 & 15 VICT. c. 99—See APPENDIX, vol. ix., p. lxx—EVIDENCE.

Id. s. 14—See APPENDIX, vol. x, p. xix—EVIDENCE.

15 & 16 VICT. c. 86—See APPENDIX, vol. x, pp. xii, xiii, xiv, xx, lxxii.

STAY OF EXECUTION.

Whether the execution of a decree for payment of a legacy to a party who is residing in a foreign country will be stayed pending an appeal against the decree, or whether security will be required from

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such party before payment pending an appeal—*quære. Suisse v. Lowther*, ii. 438

STAY OF PROCEEDINGS.

See COSTS — JOINT-STOCK COMPANY — PLEADING.

1. After dismissal of a bill for a legacy, against executors who were also residuary legatees, the plaintiff applied to stay the transfer out of Court, pending an appeal from the decree, of a sum of stock which stood to the credit of the cause; and the Court ordered, that, on the plaintiff undertaking to submit to any order the Court might thereafter make for payment of interest or costs, the transfer of the fund should be stayed, with liberty to the defendants to apply for such transfer, upon security to be given by them. *Gloucester (Mayor &c., v. Wood*, iii. 150

2. In such a case the question must be considered as if the appeal were by the residuary legatees for payment of the residue, notwithstanding an appeal from the decree by the particular legatee. *Ib.*

3. It is in the discretion of the judge to stay the execution of a decree, although a case of irreparable mischief may not be shown to be a necessary consequence of such execution. *Ib.*

4. Consideration of the difference in the effect of a decree dismissing a bill, as deciding that the position of the parties at the institution of the suit ought not to be altered, and a decree directing an act to be done which would vary that position. *Ib.*

5. Pending an appeal by the defendant from an order overruling a plea to discovery, a motion to stay the proceedings for compelling the defendant to put in his answer was refused, on the ground, that the Court saw no doubt as to the question which was the subject of appeal, and that no injury would result to the defendant from giving the discovery. *Drake v. Drake*, iii. 528

6. Motion for the stay of the taxation of costs under a decree, pending an appeal from the decree, refused, with costs. *Pinkett v. Wright*, iv. 160

7. Motion by the plaintiffs in the cause to suspend the hearing, on the equity reserved and the matter of costs, pending an appeal to the House of Lords from an order of this Court refusing a motion for a new trial of the issue *devisavit vel non*, refused. *McGregor v. Topham*, iv. 162

STEWARD.

See COPYHOLD.

SUBSTITUTED SERVICE.

STOCK.

See BANK OF ENGLAND—MORTGAGE—STATUTES, CONSTRUCTION OF, 1 & 2 Vict. c. 110, ss. 14, 15—TRUSTEE AND CESTUI QUE TRUST.

STONE.

See COPYHOLD.

STOP ORDER.

See MORTGAGOR AND MORTGAGEE.

SUBMISSION TO ARBITRATION.

See AWARD.

SUBPŒNA.

See APPEARANCE—JURISDICTION—PARTIES—SERVICE.

SUBPŒNA DUCES TECUM.

See EVIDENCE—WITNESS.

SUBPŒNA TO HEAR JUDGMENT.

See BANKRUPT.

Cause adjourned to enable the plaintiff to serve the subpoena to hear judgment, where he had omitted to take out the subpoena at the time of setting down the cause. *Harvey v. Towell*, iv. 166

SUBPŒNA TO REJOIN.

See DISMISSAL OF BILL.

SUBSEQUENT CIRCUMSTANCES.

See PLEADING.

SUBSTITUTED HEIRS OF ENTAIL.

See PARTIES.

SUBSTITUTED LEGATEE.

See SURVIVORSHIP.

SUBSTITUTED SERVICE.

See SERVICE—TRAVERSING NOTE.

1. In 1834, S. employed B. as his agent and solicitor in the matter in question, and B., in that capacity, corresponded with W. thereon. In 1843, S., who then resided abroad, being informed that the representative of W. was about to file a bill against him on the same matter, directed that he

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should be referred to B., in whose hands the matter had been. B. stated that he had no authority to appear for S., and was not professionally concerned for him:—*Held*, that service on B., of the subpoena to appear and answer the bill, could not be substituted for service on S. *Webb v. Salmon*, iii. 251

2. In a suit by a shareholder in a banking company, to restrain proceedings on and set aside a judgment against the public officer of the bank, the Court allowed substituted service of the subpoena upon the attorney at law in the judgment, where the plaintiff at law was out of the jurisdiction, although he had not caused a scire facias on the judgment to be issued against the plaintiff in equity. *Woodall v. Walker*, iii. 339

3. On a bill to enforce the performance of trusts for the sale of estates, part of which had been sold, against the trustees who could not be found, substituted service was ordered on the defendant's solicitor, who had acted on his behalf in the business of the preparation of the trust deed, and of all the sales which had taken place under it. *Hornby v. Holmes*, iv. 306

4. Service of the subpoena to appear and answer a bill of revivor and supplement, upon defendants residing out of the jurisdiction (in Italy), ordered to be substituted by service upon the solicitors appearing and acting for such defendants in the original suit. *Hart v. Tulk*, vi. 618

SUBSTITUTION.

See CONSTRUCTION—LEGACY—PARTNERSHIP—REMOTENESS.

Bequest of an annuity of £800 to the testator's wife, followed by a bequest (among others) of an annuity of £200 to the testator's daughter, and a subsequent direction, in the same instrument, that, at the death of the testator's wife, the daughter was to have £400 a year:—*Held*, that the annuity of £400 given to the daughter was in substitution for, and not in addition to, the prior annuity of £200 given to the same legatee. *Yockney v. Hansard*, iii. 620

SUBSTITUTIONAL GIFT.

See LEGACY.

SUBSTITUTIONAL LEGACIES.

See LEGACY.

SUCCESSIVE INTERESTS.

See FINES ON RENEWAL.

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SUPPLEMENTAL BILL.

SUNDAY.

In the number of days for notice of the time and place of examining a witness, an intermediate Sunday is to be reckoned. *M'Intosh v. Great Western Railway Company*, i. 328

SUPPLEMENTAL BILL.

See ACCOUNT—BANKRUPT—PARTIES—SOLICITOR—SUBSTITUTED SERVICE.

1. The defendants to an original bill held to be necessary parties to a supplemental bill against a new defendant, where the interests of such original defendants as well as those of the new defendant required that the new defendant should be a party to the suit. *Jones v. Howells, Jones v. Godsall*, ii. 342

2. Bill, by one of two next of kin, to recover from the executors of a testator funds as to which it was alleged that he died intestate, and which, in that case, they had erroneously applied. The defendants, by their answer, said, that there was another person, a next of kin. After the cause was at issue, the plaintiff filed a supplemental bill against the other next of kin alone:—*Held*, that the defendants, the executors, ought to have an opportunity of stating upon the pleadings any case they might have as against the other next of kin, and that therefore the executors ought to be parties to the supplemental bill. *Ib.*

3. On a supplemental bill, relief may be given of a nature different from that which was prayed by the original bill, where it proceeds upon circumstances arising out of subsequent dealings with the subject-matter of the original suit. *Malcolm v. Scott*, iii. 39

4. In a suit by the heir of the mortgagor, against different classes of mortgagees and incumbrancers on the estate, some of whom were in possession, a decree for redemption was made, under which certain of the defendants were declared entitled to a lien on the estate, and the accounts were directed to be taken; and, upon the plaintiff paying to the defendants the incumbrancers what should be found due to them respectively, within the time thereby limited, they were ordered to convey the estates to the plaintiff; but, in default of the plaintiff making such payment, his bill was ordered to be dismissed with costs. In a supplemental suit, brought by some of the defendants to the original suit against the plaintiff and the other defendants, a decree for carrying on the accounts was made:—*Held*, that the plaintiffs in the supplemental suit, who were incumbrancers subsequent to other defendants,

SUPPLEMENTAL BILL.

were not entitled under the decree to exhibit interrogatories for the examination of their co-defendants in the original suit (the prior incumbrancers, who were mortgagees in possession), as to their receipts in respect of the mortgaged premises—such examination not being necessary for the purposes of the suit. *Cottingham v. Shrewsbury (Earl)*, iii. 627

5. A supplemental suit grafts into the original suit the new parties brought before the Court by the supplemental suit, and enables the Court to deal with the parties to both records, as if they were all parties to the same record. *Wilkinson v. Fowkes*, ix. 193

6. A defendant to an original suit is not to be made a party to a supplemental suit, on the mere ground of a right to question the representative character of a defendant to the supplemental suit; for his title to sustain that character cannot be tried in this Court. *Ib.*

7. The original defendants are necessary parties to a supplemental bill, where the supplemental suit is occasioned by an alteration after the original bill is filed, affecting the rights and interests of the original defendants as represented on the record; but they are not necessary parties to a supplemental bill, where there may be a decree upon the supplemental matter against the new defendants, unless the decree will affect the interests of the original defendants; nor are they necessary parties, where the supplemental bill is brought merely to introduce formal parties. *Ib.*

SUPPLEMENTAL BILL IN THE NATURE OF A BILL OF REVIEW.

See PLEADING.

SUPPLEMENTAL STATEMENT.

See APPENDIX, vol. ix, p. xci.

SUPPLYING DEFECTIVE EXECUTION OF POWER.

See CHARITY.

SUPPLYING EXECUTION OF POWER.

See EQUITABLE JURISDICTION.

SUPPRESSION OF DEPOSITIONS.

See EVIDENCE.

1. Commissioners for the examination of witnesses, employed, as their ingrossing clerk, on the execution of the commission, 598

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one who, little more than three months previously, had been a clerk to the solicitor of the plaintiff in the cause:—*Held*, that such previous employment was no disqualification for the office of ingrossing clerk; and such appointment was no ground for suppressing the depositions. *Wood v. Freeman*, iv. 552

2. The Court refused to suppress depositions on a ground of objection to which the attention of the commissioners had not been called, where a different objection had been made before them, and had been properly overruled. *Ib.*

SURETY.

See PRINCIPAL AND SURETY.

SURGEON AND PATIENT.

See FAITH AND CONFIDENCE.

SURPRISE.

See OUTSTANDING TERM.

SURVEYING AND SETTING OUT A RAILWAY LINE.

See STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18.

SURVIVING BROTHERS AND SISTERS.

See WILL.

SURVIVOR.

See CONSTRUCTION—LEGACY—WILL.

SURVIVORSHIP.

See CONSTRUCTION—JOINT TENANCY.

Devise and bequest of real and personal estate to trustees, upon trust (subject to certain legacies and annuities) for A. for life, and, after his decease, upon trust to convey, assure, and pay the whole of the said real and personal estate to and amongst the children of A., and the issue of any such children. But, in case A. should die without issue, then to pay and distribute the same equally amongst all and every the children of B. and C., and the survivors of them; but, in case any of such children should be then dead, leaving issue of his, her, or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might

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have been entitled to by survivorship or otherwise. *A.* survived the testator, and died without issue:—*Held*, that the period of the survivorship of the children of *B.* and *C.* is not to be referred to the time of the death of the testator, but to that of the death of *A.* being the period of distribution; and that the children of *B.* and *C.* living at the date of the will, and those born after that date and before the death of *A.*, were entitled to the real and personal estate, with survivorship between them in case of the death of any of such children without issue before the death of *A.*,—the children of such of the said children as died before *A.*, leaving issue, being substituted for the original legatees. *Buckle v. Fawcett*, iv. 536

TAKING BILL OFF THE FILE.

See DEMURRER—PLAINTIFF—PLEADING.

Bill taken off the file by consent. *Walton v. Broadbent*, iii. 334

TAKING PLEADINGS OFF FILE.

The answer of a defendant not answering any interrogatories of the bill, and which was put in after the time for answering had expired and an order for further time had been obtained, ordered to be taken off the file. *Lynch v. Leceane*, i. 626

TASTE OR ORNAMENT.

See TRUST.

TAXATION.

See APPENDIX, vol. x, p. lxxv—Costs—MORTGAGOR AND MORTGAGEE—SOLICITOR AND CLIENT.

1. In a suit against a solicitor for an account, in taking of which the bills of costs are taxed, and reduced more than one-sixth in amount, the Court has jurisdiction to give or withhold the costs of taxation, according to the circumstances and justice of the case. *Barton v. Pyne*, i. 493

2. The survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiff, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his lifetime, had carried in a joint bill of costs for taxation. *Hunter v. Daniel*, vii. 281

TENANCY IN COMMON.

See CY PRES—JOINT TENANCY.

Bequest of residuary estate to accumu-
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TENANT BY THE CURTESY.

late for ten years, and then to be distributed in seven equal shares unto seven persons named in the will, and appointment of the same seven persons residuary legatees, creates a tenancy in common; and the share of one dying in the testator's lifetime belongs to the next of kin of the testator, *Norman v. Frazer*, iii. 84

TENANT.

See COPYHOLD.

TENANT BY THE CURTESY.

1. Although the right of the husband, as tenant by the curtesy of an equitable estate of the wife, may perhaps be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement during the whole period of coverture; yet the possession of the estate in conformity with the equitable interests of the cestui que trust, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. *Parker v. Carter*, iv. 400

2. The possession of the cestui que trust, under the trusts of a settlement, is the possession of the trustee, and gives the trustee a seisin of the estate, which is not interrupted by the death of the cestui que trust, but immediately enures for the benefit of the person next entitled to the equitable interest; and, notwithstanding the adverse possession of another party soon afterwards commenced, the Court cannot presume such adverse possession to have commenced so instantaneously on the death of the first cestui que trust, as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Ib.*

3. To a bill, by the heir-at-law of a married woman, to recover lands to which she was equitably entitled in fee, the husband, who is surviving and would have been tenant by the curtesy if the wife had been seised of the estate, is a necessary party, although the wife was never in actual possession. *S. C.*, iv. 405

4. If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or, if both the trustee and cestui que trust are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. *S. C.*, iv. 416

TENANT BY ELEGIT. TENANT FOR LIFE & REMAINDERMAN.

TENANT BY ELEGIT.

See EQUITABLE MORTGAGE.

TENANT FOR LIFE.

See ADMINISTRATION—APPORTIONMENT—
CY PRES.

1. The testator directed his real and personal estate to be converted, got in, and invested in government or real securities, and the interest, dividends, and annual produce to be paid to his wife for her life. The greater part of the testator's property at his death consisted of capital in a partnership business abroad, to be withdrawn, by instalments, in the course of three or five years, at the discretion of his executors, and bearing interest at five per cent. in the meantime.

Held, that the tenant for life would be entitled to the income actually produced by such of the property of the testator as was invested according to his will, from the time of such investment; but that she was not entitled during the first year after the testator's death to a larger income, in respect of such part of the testator's property as was not so invested, than the property would have produced, if invested according to the will. *Taylor v. Clark*, i. 161

2. Form of the reference to inquire whether it is proper to cut timber, during the continuance of the estate of a tenant for life of the lands impeachable of waste. *Tollemache v. Tollemache*, i. 456

3. A tenant for life cannot lay out monies in building or improvements on the estate, and charge them on the inheritance; and, therefore, the Court will not direct an inquiry what sums were expended by the tenant for life in substantial improvements beneficial to the inheritance. *Caldecott v. Brown*, ii. 144

4. Charges paid off by the tenant for life *prima facie* kept alive and not merged in the inheritance. *Faulkner v. Daniel*, iii. 217

TENANT FOR LIFE AND REMAINDERMAN

See CONVERSION—COSTS—DEVISE—
FINES ON RENEWAL—LUNACY.

1. Devise and bequest of residuary real and personal estate to trustees, upon trust, with all convenient speed to sell the real estate and such part of the personal estate as was in its nature saleable, but the mode and time of sale and of settling and adjusting accounts, and of requiring payment of what should be due to the testator, to be left entirely to the discretion of the trustees; and until such sale and the final ad-

justment of his co-partnership accounts, the rents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to the testator, to be paid to the same persons and in the manner directed with respect to the income of the estate when invested. The testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay 2*5*l. a year out of her moiety of the income of his estate for the education and maintenance of his nephew, until the nephew attained twenty-one years—*Held*, that (there being no improper delay in the conversion of the estate) the daughters of the testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realisation of the whole of such estate, and the investment thereof according to the directions in the will; but that they were not entitled, during that interval, to any interest upon such parts of the residuary property, or on the value of such parts thereof as were unproductive. *Mackie v. Mackie*, v. 70

2. That the two sums of 2*5*l. were only to be allowed by the daughters to the nephew yearly out of their income during their lives, and that such sums did not constitute a charge upon the life interests of the daughters for the whole period of the minority of the nephew. *Ib.*

3. Where a term of years is bequeathed to a legatee for life, with remainder over, and the legatee for life, having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survives the duration of the term, the legatee for life, and not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale. *Phillips v. Sarjent*, vii. 33

4. *Quere*, if the legatee in remainder (not being a party to the conversion) sues for a portion of the purchase-money in the lifetime of the tenant for life, whether the Court will do more than secure the fund, or whether it will apportion the fund according to the value of the respective interests. *Ib.*

5. Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, or by demising, mortgaging, or selling the estate (except the mansion-house) for all or any part of the term, or by all or any of the said ways, or any other reasonable ways, to raise £30,000, and pay the same to the parties therein mentioned:—

TENANT FOR LIFE & REMAINDERMAN. TENANT IN COMMON.

Held, that, as between the tenants for life not impeachable for waste and the remainderman, the corpus of the estate must bear the charge; and that the interest of the charge must be paid by the tenant for life in possession, who, in the meantime, was entitled, as part of the profits of the estate, to the timber, which, as such tenant for life, he had a right to cut. *Marker v. Kekewich*, viii. 291

6. The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think; and it does not follow, that, because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. *Ib.*

7. To a bill by one of the successive tenants for life under the limitation, against the trustees of the term and the tenant for life in possession, to restrain the trustees from raising the £30,000 by sale or mortgage of the estate, until the timber of full growth (of which it was alleged that a large quantity was standing on the estate) had been cut and applied towards that purpose, demurrers were allowed. *Ib.*

8. Estates were settled to the use of trustees upon such trusts as A. and B. should jointly appoint, and, subject thereto, to the use of A. for life, with remainder to B. for life, remainder to the first and other sons of B. in tail, with a power in the trustees, with the consent of A. or the first person entitled to an estate of freehold in the premises, to agree with any Railway &c. Company for the purchase-money and compensation in respect of any portion of the estate, and that their receipt should be a sufficient discharge; and to receive the monies to the same uses as the settled estates. A Railway Company gave notice of taking a portion of the lands under their powers, and a negotiation took place as to the price: the company, requiring immediate possession, deposited £8,000 in a bank as security for and until payment of the sum which should be awarded or agreed upon. The company subsequently gave a further notice to take another portion of the same estates; and a sum of money was paid by the company to A. and B. upon their joint receipt, in which it was expressed to be paid on account of the compensation money to be ultimately fixed, and to be paid by the company in respect of the said estates. Before the amount of the price and compensation was fixed, A. died. On a bill by B. as executor of A. against the trustees and the company, to enforce the sale as upon a binding contract, and obtain payment of the purchase-money

(B. waiving any claim thereto in his own right), the Court *held* that there was no contract for the sale of the lands to the company, binding by its own force on the donee of the power, and that the remainderman could not be affected by the conduct of the donee of the power; and that, inasmuch as there was not, during the life of A., any contract for the sale of such lands binding on A. and B., independently of the possession by the company, there was, therefore, no contract which could be enforced against the remainderman. *Morgan v. Milman*, x. 279

9. A testator bequeathed so much of his personal estate as when invested in stock would produce £125 a year, to trustees, upon trust to pay the dividends of such stock to A. for life, with a direction that the capital stock should, at A.'s death, fall into the residue of his (the testator's) estate; and a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear and sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A.:—*Held*, that A. was not entitled to have the reduced dividends made up to £125 a year by a sale of a portion of the capital of the stock. *Bugue v. Dumergue*, x. 462

TENANT FOR LIFE AND TENANT IN TAIL.

1. Tenant for life not entitled to get stone from quarries on the settled estates (except for repairs, &c.), nor to open or work any mines of coal or minerals not opened or in work at the death of the testator. Tenant in tail entitled to the moneys realised by the tenant for life from stone not used for repairs, and minerals from newly-opened mines. *Ferrand v. Wilson*, iv. 388

2. Inquiries and accounts as to mines and minerals, as between such parties. *Ib.*

TENANT FOR LIFE OF AN ESTATE SUBJECT TO A DEMISE FOR 200 YEARS.

See PARTIES.

TENANT IN COMMON.

See CHARITABLE TRUST OR USE—IMPROVEMENTS.

A tenant in common occupying the premises held in common not excluding his co-tenants in common, is not chargeable by

TENANT IN COMMON.

such co-tenants with an occupation rent.
M'Mahon v. Burchell, v. 322

TENANT IN FEE.

See MERGER — STATUTES, CONSTRUCTION
OF, 4 & 5 Will. 4, c. 22.

TENANT IN TAIL.

See CY PRES. — MERGER — PARTIES —
SPECIFIC PERFORMANCE.

TENDER.

See COSTS—SPECIFIC PERFORMANCE.

TERM OF YEARS.

See ANNUITY — ESCHEAT — TENANT FOR
LIFE AND REMAINDERMAN.

TESTAMENTARY DISPOSITION.

See VOLUNTARY DEED.

TIMBER.

See JURISDICTION—POWER—TENANT FOR
LIFE—TENANT FOR LIFE AND REMAIN-
DERMAN — TRUSTEE AND CESTUI QUE
TRUST — VENDOR AND PURCHASER —
WASTE.

TIMBER ESTATE.

See VENDOR AND PURCHASER.

TIME.

See AMENDMENT — CONTRACT — GENERAL
ORDERS, 1842, Oct., r. xxiii; 1845, May
— JOINT-STOCK COMPANY—MORTGAGOR
AND MORTGAGEE — PLEA — SERVICE —
SPECIFIC PERFORMANCE—SURVIVORSHIP
— VENDOR AND PURCHASER — VEST-
ING.

The 19th Order of April, 1828, although it excludes the Michaelmas and Christmas vacations from being reckoned in the time allowed for amending bills, has not, in a case where the answer must be deemed sufficient before the vacation, and the plaintiff has obtained no order to amend, the effect of excluding the vacation from being counted in the second period of two months, at the end of which, according to the 4th and 16th Orders of April, 1828, the defendant may move to dismiss for want of prosecution. The 26th Order of December, 1833, makes no difference in that respect. *Goldsworthy v. Crossley*,
ii. 639

TITHES.

TIME FOR RAISING PORTIONS.

The trusts of a term of years were to raise as portions for younger children, £5,000 if there should be one; £8,000, if two; and £10,000, if three or more, to be divided among them equally, the shares of the sons at twenty-one, and the shares of the daughters at twenty-one or marriage. There were three younger children:—*Held*, on petition, that the heir-at-law, on attaining twenty-one, was not entitled to have the portions raised and his estate discharged before the portions became payable; and that the Court would not order a larger sum to be raised for portions than had actually become vested and payable to the children who had attained twenty-one or married. *Sheppard v. Wilson*, iv. 392

TIME OF MAKING CONTRACT.

See MORTGAGOR AND MORTGAGEE.

TIME OF VESTING.

See CONSTRUCTION.

TITHES.

See DISCLAIMER—EXTRA-PAROCHIALITY—
STATUTES, CONSTRUCTION OF.

1. The proof of the title of the vicar to some small tithes, and that the other small tithes had never been paid to the rector, is not necessarily sufficient to establish the right of the vicar to such other small tithes, especially where some of the evidence is opposed to the vicar's claim. *Sal-
held v. Johnston*, i. 196

2. The Act for tithes in *London* (37 Hen. 8, c. 12) provided that the inhabitants of *London* should pay 2s. 9d. in the pound for tithe upon the rent reserved; or if a less rent was reserved by reason of any fine, or if the owners were also occupiers, then the tithe to be paid at the same rate upon the rent at which the premises were last letten for, without fraud or covin. A house and premises in *London* were let for a term of sixty years at a reserved rent (including insurance) of 102l. 10s. in consideration of the lessee laying out 2000l. in building thereon. The improved annual value of the property, after the building was completed, was 250l.:—*Held*, that, under the statute, the tithe was to be paid at 2s. 9d. in the pound, not on the reserved rent alone, but on the full annual value of 250l. *Vivian v. Cochrane*, iv. 167

3. To a bill by the rector for an account of tithes against the owners of the manor and lands in the parish, the defendants set up a modus of 13l. 6s. 8d. By the docu-

TITHES.

ments coming out of the possession of the defendants, it appeared that 13*l*. 6*s*. 8*d*., and also 8*s*. 9*d*., (not pleaded), had been paid by the owner of the manor and lands, for different considerations expressed in the documents, and at different times of the year, from 1607 till 1823, when the then owners of the fee agreed to discontinue the money payments, and thenceforward to pay tithes in kind:—*Held*, that, in such a case, the Court would decree an account of the tithes without requiring the plaintiff to establish his right at law either in an issue or by an action. *Raine v. Cairns*, iv. 327

4. That, in such a case, if, upon the evidence, the existence of the modus, as pleaded, were doubtful, the Court would direct an issue, and not leave the plaintiff to his action at law. *Ib.*

5. *Semble*, that the defendants were not bound by the agreement between the rector and the last owners, but were at liberty to relieve themselves of the tithe, as of an incumbrance on the estate, notwithstanding they had notice, at the time of their purchase, of the agreement between the last owners and the rector, and of the subsequent payment of tithes in kind. *Ib.*

6. An Act for making a railway enabled the company to pull down the houses of a parish in the city, and provided for the indemnity of the rector in respect to his right to the tithes of 2*s*. 9*d*. in the pound on the removed buildings, by enacting that the company should pay the rector tithes in respect of the houses removed according to the last assessment thereof to Lady-day preceding, equal to the loss sustained by the want of occupiers owing to such removal, until new houses or other buildings should be erected of such annual value that the tithes payable thereon should be equal to the tithes payable on the buildings removed, such payments to diminish in proportion to the yearly sums actually payable for tithes on the new buildings. The company pulled down houses, on some of which the tithes of 2*s*. 9*d*. in the pound were paid on the full annual value—on others, of which the same had been paid by agreement between the rector and the occupier, at less than the full annual value—and several on which the tithes had been wholly or partly remitted by the rector for the sake of harmony:—*Held*, that the rector was not, under the Railway Act, entitled to tithes from the company according to the value at which the property removed was assessed to the poor-rate. *Letts v. The London and Blackwall Railway*, v. 605

7. That the rector was entitled to tithes from the company according to the annual value at which the property removed had

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been last fixed by agreement between the rector and the occupier. *Ib.*

8. That where no agreement was proved to have been made between the rector and occupier, the sum last collected as tithes should be taken as representing 2*s*. 9*d*. in the pound on the annual value of the buildings. *Ib.*

9. The enactment of the Tithe Commutation Amendment Act (9 & 10 Vict. c. 73, s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger. *Walker v. Bentley*, ix. 629

10. The intention of the Tithe Commutation Act is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast, shall not be liable to tithe. *Ib.*

11. Lands, which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the Tithe Commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe. *Ib.*

12. The intention of the Legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and, such being the intention, the merger is effected, although the sanction of the Commissioners has been erroneously given. *Ib.*

TITLE.

See APPENDIX, vol. ix, p. lviii—CONSTRUCTION—COSTS—DEMURGER—EXCEPTIONS—INTERPLEADER—LESSOR'S TITLE—PLEADING—POSSESSORY TITLE—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

On a contract for the sale of a share in a mine described as "one 192nd part or half share of the Tresavean mine, in the district of Gwennap, in the county of Cornwall," it is not sufficient for the vendor to show a title to the specified share of the mine as between himself and his co-adventurers, without showing some title in himself and his co-adventurers to the mine of which he

TITLE.

had contracted to sell a share. As to the title he must show—*quare*. *Curling v. Flight*, vi. 41

TITLE-DEEDS.

See DISCOVERY—EXECUTOR—MORTGAGOR AND MORTGAGEE—PRODUCTION OF DOCUMENTS—VENDOR AND PURCHASER.

Deeds brought into Court by the executor, under the common order for production of documents made in a creditors' suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; and the Court refused to order such deeds to be delivered to the plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds. *Plunkett v. Lewis*, vi. 65

TITLE OF ACCOUNT.

See APPENDIX, vol. ix, p. lix.

TITLE OF ANSWER.

See ANSWER.

TOLLS.

See PENALTIES—RAILWAY COMPANY.

Tolls, within the meaning of the Railways Clauses Consolidation Act, should be fixed with reference to the number of carriages of one railway company which pass over the line of another railway company, under the terms of the agreement between the two railway companies—*Semble. Simpson v. Denison*, x. 60

TOWN AGENT.

See SERVICE.

TRADE LABELS.

See INJUNCTION.

TRADE MARK.

See INJUNCTION.

TRANSFER OF SHARES.

See JOINT-STOCK COMPANY.

TRAVERSING NOTE.

See ANSWER.

1. Leave to file a note under the 21st Order of August, 1841, will not be given where the subpoena to appear and answer was not served under the 14th Order. *Snell v. Crocker*, i. 108

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2. The traversing note, filed and served under the 21st Order of August, 1841, has the same effect as an answer, in traversing the whole of the bill; but it has not, for the purpose of evidence, the same effect as an answer upon oath. *Martin v. Norman*, ii. 596

3. Personal service of the copy of a traversing note may be made (by leave of the Court, independently of the General Orders,) upon a defendant who has not taken any step to defend the suit, either in person or by a solicitor, and where the service cannot, therefore, be made in the manner directed by the 56th General Order of May, 1845. *Laurie v. Burn*, vi. 308

4. Where a bill of revivor and supplement was filed by one of two plaintiffs, and the other plaintiff, refusing to join, was made a defendant, and an appearance entered for him under the 29th General Order of May, 1845, and such defendant afterwards obtained and served an order changing his solicitors in the cause—the Court, upon an application by the plaintiff, supported by affidavit that diligent inquiries had been made for such defendant, but he could not be found, ordered, that service upon the new solicitor named in the order for changing solicitors, of a copy of the traversing note, should be deemed good service upon such defendant. *Wallis v. Darby*, vi. 618

TRESPASS.

See SHIP.

TRIAL AT LAW.

See CONSIDERATION—COPYHOLD—COSTS—INJUNCTION—ISSUE—MOTION—SETTING DOWN CAUSE—WITNESS.

TRIAL OF ISSUE.

See PARTNERSHIP.

The Court will not direct an issue, unless the result of the issue must, in any event, be material. *Price v. Berrington*, vii. 403

TRUST.

See ADMINISTRATION — ALIENATION — CHARGE — EQUITY OF REDEMPTION — FORECLOSURE — INTEREST — LEGACY — PARTNER — STATUTES, CONSTRUCTION OF, 8 & 9 Vict. c. 18 — TRUSTEE AND CESTUI QUE TRUST — VOLUNTARY ASSIGNMENT — WILL.

1. Injunction granted upon motion to restrain, until the hearing of the cause, an action by an administrator to recover a debt which was formerly due to his intestate—upon affidavit that the intestate had

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requested the debtor to hold the sum due in trust for the plaintiff, and that the debtor had accepted the trust, and paid over a part of the fund to the plaintiff. *M'Fadden v. Jenkins*, i. 458

2. Whether the facts stated by the affidavit, if proved, would be sufficient to create a trust in favour of the plaintiff—*quære*. *Ib.*

3. The testatrix drew a cheque on her bankers for £150 in favour of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary to make up to a legatee the difference in value between a legacy of £100, which the testatrix, by her will, had given to the legatee, and the price of a £100 share in a certain railway; the testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the £150. The testatrix afterwards died. In a suit for the administration of her estate:—*Held*, that no trust, in respect of the £150, was created for the benefit of the legatee. *Hughes v. Stubbs*, i. 476

4. The transfer by an executor of the trade of his testator, and of the premises in which it was carried on, which were of small value, to a third party, who afterwards continued the trade for his own benefit:—*Held*, under the circumstances, not to be necessarily a breach of trust. *Portlock v. Gardner*, i. 594

5. Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held, that the onus was on the residuary legatee to prove that the conduct of the executor, which might have been a breach of trust, was so in fact; and that the onus was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced. *Ib.*

6. A Court of equity will not, after a great lapse of time (as of more than twenty years), and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against the defendant, although the same lapse of time would be no bar to a claim founded upon an express trust. *Ib.*

7. Different forms of suit by a cestui que trust in respect of claims against the trustees and strangers, as debtors, or liable to the trust. *Lund v. Blanshard*, iv. 28

8. Cases in which the liability of the trustee and a stranger to the trust may be indivisible; and the stranger is a proper

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party with the trustee to the suit of the cestui que trust. *S. C.*, 29

9. The case of a trust or restriction created for the preservation of ornamental timber, is not like a trust for purposes of benevolence (as to which the objects are unlimited, and no standard can be found), but, *semble*, is a trust or restriction which the Court will endeavour to execute or enforce. *Marker v. Marker*, ix. 1

10. There are cases in which the Court may execute a trust for the application of money to purposes of taste or ornament, and, in doing so, may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon the opinions of persons who are consulted by others in such matters, as it acts in other cases upon the opinions of persons of science—*semble*. *Ib.*

11. The Court may more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the case of equitable waste in the absence of any such trust—*semble*. *S. C.*, ix. 18

TRUST, DELEGATION OF.

See APPOINTMENT.

TRUST FOR SALE.

See CONVERSION.

TRUSTEE.

See CHARITABLE TRUST OR USE—CONDUCT OF SALE—CONTRIBUTION—COSTS—COVENANT—INFANT—PARTIES—PLEADING—POWER—STATUTES, CONSTRUCTION OF, 1 *Will.* 4, c. 60; 1 & 2 *Vict.* c. 110; s. 15—SUBSTITUTED SERVICE—TRUSTEES AND CESTUI QUE TRUST.

1. In a suit by an equitable mortgagee of leaseholds to enforce his security, a decree was made for sale in default of payment, and the premises were sold under the decree; the mortgagor, then out of the jurisdiction, was held not to be a trustee, within the Act 1 *Will.* 4, c. 60, for the purchaser, but to be a trustee, within that Act, for the plaintiff in the cause; and a person was appointed to execute the assignment in the place of such trustee. *King v. Leech*, ii. 57

2. The institution of a suit against trustees for the administration of the trust estate under the direction of the Court does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees or the management of the trust;

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but the trustees are required, after the institution of the suit, to act under the control of the Court. *Cafe v. Bent*, iii. 245

TRUSTEE AND CESTUI QUE TRUST.

See ADMINISTRATION SUIT—ADMISSION AND DISCHARGE—ANSWER—APPENDIX, vol. x, p. xxii—CHARITY—COPYHOLD—COSTS—DEBTOR AND CREDITOR—DEMURRER—DEVISE—EVIDENCE—EXECUTOR—FORFEITURE—HERITABLE BOND—HEIRLOOMS—HUSBAND AND WIFE—INFANT—INTEREST—INVESTMENT—JOINT-STOCK COMPANY—JURISDICTION—LAPSE OF TIME—LEGAL ESTATE—LIS PENDENS—MORTGAGE AND MORTGAGEE—MORTMAIN ACT—NOTICE—PARTIES—PARTNERSHIP—PAYMENT INTO COURT—POWER—PRIORITY OF CHARGE—RECEIVER—RECTIFYING SETTLEMENT—REFERENTIAL GIFT—STATUTES, CONSTRUCTION OF, 7 & 8 Vict. c. 70, 10 & 11 Vict. c. 96—TENANT FOR LIFE AND REMAINDERMAN—VENDOR AND PURCHASER—VOLUNTARY DEED—VOLUNTARY INSTRUMENT—VOLUNTARY PROMISE.

1. Trust-funds were invested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the name of joint-owners or cestui que trusts). The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him: he afterwards became bankrupt:—*Held*, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his cestui que trusts. That, therefore, the cestui que trusts were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy, as could be presumed to be identical with the shares in which the trust-funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Pinkett v. Wright*, ii. 120

2. The retention of a voluntary deed of covenant in the possession of the covenantor, and the absence of communication respecting it to the trustees and the cestuis

TRUSTEE & CESTUI QUE TRUST.

que trust, does not affect its validity. *Fletcher v. Fletcher*, iv. 67

3. Executors, who are also devisees in trust of real estate, charged by the will with debts generally, represent the persons beneficially interested in such real estate, within the meaning of the 30th Order of August, 1841, although the trustees are not otherwise empowered to give discharges for the proceeds. *Savory v. Barber*, iv. 125

4. An unmarried lady transferred a sum of stock to trustees, for herself. The letter supposed to contain the terms of the trust was lost, and no evidence was given of its contents. After the marriage of the lady, the husband and wife demanded a transfer of the fund, which the trustees refused to make without the direction of the Court, unless the fund should be settled for the benefit of the wife and her issue:—*Held*, that the trustees ought to have transferred the fund without suit, and must therefore pay the costs. *Penfold v. Bouch*, iv. 271

5. Executors cutting timber upon a supposed trust, afterwards held to be void, might be personally chargeable in equity as trustees for the owner of the timber, if they acted fraudulently, or if they retained the proceeds of the timber, or gained any benefit by it; but not if they acted by mere mistake, and held no part of the proceeds in their hands. In the latter case, the executors might be regarded in equity as strangers, who, under a mistaken supposition of right, had done a legal wrong, for which there was a legal remedy. *Ferrand v. Wilson*, iv. 383

6. The testator directed his trustees to invest the residue of his personal estates in Government or real securities. Some of the cestuis que trust and one of the trustees permitted the trust moneys to remain in the hands of the other trustee at interest:—*Held*, that, inasmuch as no investment was made, the trustees were chargeable with the whole amount of the trust funds possessed by them, with interest; but were not answerable for the amount of consols, or any other particular security, in which they might, according to the directions of the will, have invested the trust moneys. *Shepherd v. Moul*, iv. 500

7. Trustee, depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it until about five months afterwards, when the bankers became bankrupt. *Challen v. Shippam*, iv. 555

8. A., by will, bequeathed a sum of stock, equally between B. and C. B. and C., by their respective wills, bequeathed

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their respective residuary personal estates (which included their shares of the stock) among their children, and appointed executors. The children of B., and some of the children of C., filed their bill against the executor of A. to recover the fund, making the executors of B. and C., and the rest of the children of C., parties:—*Held*, that, although the suit was multifarious, yet, as it had been brought to a hearing, and it was not open to the objection of misjoinder, the Court might, if it thought proper, make a decree for the accounts and inquiries preparatory to the distribution of the fund. *Powell v. Cockerell*, iv. 557

9. That, notwithstanding the bill alleged that the estate of B. was fully administered, and that the parties beneficially interested in the estate were parties to the suit, yet the executor of B. was a party against whom direct relief was in substance prayed, and he was not therefore a party to be served with a copy of the bill, within the 23rd Order of August, 1841. *Ib.*

10. By an agreement made in 1794, a plot of land and certain premises thereon, situated in Oldham-street, Liverpool, were vested in trustees, to be used as a place of religious worship "according to the ordinances, rules, and forms of the Church or Kirk of Scotland;" and a subsequent conveyance was made of the same land and premises to the trustees, "to be for ever thereafter appropriated and used as a place of divine worship, according to the doctrines and discipline of the Church of Scotland." The premises were thenceforward occupied as such place of worship, and the office of minister or pastor of the congregation was filled from time to time by licentiates of the Church of Scotland, who were ordained and inducted by presbyteries in Scotland. In 1833, a Lancashire Scottish Church Presbytery was formed, to which the Oldham-street congregation united themselves; and the Lancashire Presbytery, and other presbyteries in England in 1836, united themselves into an English synod, which was in 1839 recognised by the General Assembly of the Church of Scotland. In 1842, a licentiate of the Church of Scotland, by license from the Presbytery of Greenock, was ordained and inducted as minister of the Oldham-street Church, according to the presbyterian forms, by the Lancashire Presbytery. In 1843, certain ministers and members of the Church of Scotland adopted the name of the Free Church, and seceded from the Established Church, and were declared by that church to be no longer ministers thereof. The English synod declared its disapproval of the conduct of the Established Church of Scotland, and its sympathy with the Free

Church, recognising the latter as a sister Church, and resolving to interchange ministers therewith. The minister of the church and the trustees of the premises in Oldham-street co-operated with the seceders, by allowing ministers of the Free Church to officiate in the church in Oldham-street; and the minister, who was deprived of his license by the Presbytery of Greenock, also continued to officiate:—*Held*, upon motion, that the minister and the trustees had departed from the trusts created by the original contract upon which the premises in Oldham-street were vested in them; and that the Court would interfere by injunction, before the hearing, to prevent the premises in Oldham-street from being used otherwise than as a place of religious worship on the model of the Church of Scotland, as established by law. *Attorney-General v. Welsh*, iv. 572

11. Suit against trustees, alleging breaches of trust, by omitting to make repairs, and to provide a fund for the renewal of leases, as directed by the will. The widow of the testator (who was tenant for life under the will), and two others, were the trustees. The widow married again, and afterwards died, leaving her husband surviving, and leaving assets of her separate estate:—*Held*, that, as there were assets of the widow which were or might be liable to the trust, it was not a case in which the plaintiff could, under the 32nd Order of August, 1841, proceed against the other trustees and the husband of the testator's widow, without making a personal representative of the widow a party; and that the defect was not removed by the waiver of any relief against the assets of the widow, or against all the trustees, in respect of breaches of trust before the marriage of the widow. *Skipton v. Rawlins*, iv. 619

12. In a suit to appoint new trustees of a settlement, where a part of the trust property had been lost by previous negligence or breach of trust, the Court refused to confine the trust to the remaining property, but appointed the new trustees of the whole of the property comprised in the settlement, directing (for the protection of the new trustees) a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost. *Bennett v. Burgess*, v. 295

13. An executor having possessed a promissory note for £400, part of the assets of the testator, retained the note in his possession, without taking any proceedings to recover the amount of the interest for seven years; and at the end of seven years, when the sole residuary legatee came of age, the executor delivered the note to the re-

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aiduary legatee. The residuary legatee ten years afterwards filed his bill against the executor, charging him with breaches of trust in the administration of the estate. The Court, in such circumstances, refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce payment of the amount due on the note. *East v. East*, v. 348

14. In such a case the executor would not be chargeable, unless it should be found that the amount of the note could have been recovered during the seven years between the death of the testator and the time when plaintiff attained his majority; and if it were found that the amount could have been recovered during that time, still the executor would not be chargeable unless it should be found that the amount could not have been recovered during the ten years which elapsed after the note had been delivered to the plaintiff. *S. C.*, v. 349

15. A marriage-settlement made in 1811 recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company; and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee, for an account of the trust-funds, charging them with the 10,000 rupees. Under a reference to the Master, to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the Court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of the 10,000 rupees at the time of the settlement. *Symes v. Eyre*, vi. 137

16. The representative of the trustee who died six weeks after the making of the settlement was not a necessary party, such trustee not having possessed any part of

the trust-funds, and not being chargeable with the default. *Ib.*

17. The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the cestuis que trust for that purpose, *held*, that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the cestuis que trust were entitled to have new trustees appointed by the Court. *Mortimer v. Ireland*, vi. 196

18. R., the factor of W., of W. & K., of W. K. & P., of W. P. & C., and W. & B., accepted bills drawn on him by W. & P., they (W. & P.) agreeing that all the goods in R.'s hands, consigned to him by W. & P., either solely or jointly, should be security to R. for the amount of his acceptances. R. sold the goods in his own name. W. afterwards became bankrupt, and the assignees of W. gave notice to the buyers of the goods not to pay R. the monies due in respect of such sale. All the debts owing for the goods were afterwards, by indenture, to which R. and the assignees of W. were parties, assigned to trustees, upon trust to apply the same as R. might legally do if the assignment had not been made. R. afterwards became bankrupt. The trustees having received the proceeds of the goods, filed their bill against the assignees of W. and of R., for the direction of the Court in the execution of the trust. By the decree, the Master was directed to state what bills of exchange had been accepted against the goods, and the amount and particulars of such acceptances, and the amount unpaid; and for that purpose he was to be at liberty to publish advertisements. Under such advertisements several claims were made before the Master, by K., and by other holders of the bills accepted by R. On further directions, *held*,—that the bill-holders had no interest in the proceeds of the goods, except that which might arise from the result of the contract between R. and W. & P.; that, if there had been no bankruptcy, the bill-holders could not have sustained a suit to have the proceeds of the goods applied for their benefit; that the happening of the bankruptcies did not affect the equitable rights of the parties; that the doctrine of the case of *Ex parte Waring* established a special mode for the payment of creditors applicable to the administration of the estate in the bankruptcy, but not to the administration of the trust in equity; that the advertise-

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ments made under the decree, and which had caused the bill-holders to appear before the Master, gave them no right to appear, and that they were not entitled to appear on further directions; and that (the general account as between the estates of W. and of R. being waived by the respective assignees) the assignees of R. were entitled to recover the trust fund, and to administer it in that bankruptcy. *Laycock v. Johnson*, vi. 199

19. Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the Accountant-General, under the Trusts Act, 10 & 11 Vict. c. 96. *In re Parry*, vi. 306

20. A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeable and according to her own discretion during her life, confers upon the wife a discretionary power, which the Court will not disturb so long as it is reasonably and honestly exercised. *Costabadie v. Costabadie*, vi. 410

21. Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the Court will, in a proper suit, inquire into the manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the Court will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits, where there is reason to apprehend that the conduct of the trustee may be liable to question, the Court may require the discretion of the trustee to be exercised under its view. *Ib.*

22. Under a contract for the sale of land, the equitable title of the vendor, and those representing him, to recover from the vendee, and the obligation of the vendee to pay—the purchase-money, in the sense in which it is described as a trust, is not an express trust, within the 25th sect. of the stat. 3 & 4 Will. 4, c. 27; and, therefore, that the right of the vendor, as such cestui que trust, to a lien or charge upon the land for the amount of the purchase-money, is not kept on foot, under the provision contained in that section. *Toft v. Stephenson*, vii. 1

23. Upon a reference to the Master to appoint new trustees in a case where the power of appointment is vested by the author of the trust in a party to the cause, the Master will have regard to such power in selecting the trustees from the persons pro-

posed by that party and by others; but the Master is not bound to approve of the persons nominated by such party in preference to other persons whom he may consider more eligible; and his decision is not open to exception merely because he has not chosen the persons nominated by the party to whom the power was given. *Middleton v. Reay*, vii. 106

24. *Semble*, where parties in a cause have a power of appointing new trustees, and it is proper for the appointment to be made in the cause, there should be special directions to the Master to approve of proper persons to be nominated by the parties having the power, if it be intended to preserve their right of nomination. *Ib.*

25. Circumstances in which the exercise of a power of sale, although not inconsistent with the terms in which the power is created, would, notwithstanding, be a breach of trust. *Marshall v. Sladden*, vii. 428

26. Reciprocal duties of trustees and cestuis que trust, where it becomes necessary to raise money to discharge incumbrances on, or otherwise deal with, the trust property. *Ib.*

27. Circumstances in which it is improper for a retiring trustee to appoint a new trustee without communication with the cestuis que trust. *Ib.*

28. Trustees ought not to exercise a power of selecting new trustees for the mere purpose of continuing the trust property under the management of a particular solicitor, even if the trustees they select be otherwise unobjectionable. *Ib.*

29. A trustee who retired and allowed a new trustee to be appointed, without communication to his cestui que trust, is not a necessary party to a suit complaining of such new appointment, and seeking to displace such new trustee and appoint others, all relief against the retired trustee being waived. *Ib.*

30. Distinction between a trust created for the use of Protestant Dissenters generally, and for the use of an existing congregation of Protestant Dissenters belonging to a particular minister: in the former case Presbyterians, Baptists, and Independents, are included; in the latter, the terms of the trust open an inquiry into the particular character of the congregation which is the object of the trust. *Attorney-General v. Murdoch*, vii. 445

31. It is not necessary, in order that the Court may be enabled to enforce a trust for a certain congregation of Dissenters, that the trust should be declared by any deed or writing; the Court may ascertain, from evidence of usage or otherwise, the particular trusts to which the property is dedicated. *Ib.*

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32. Where trusts of a meeting-house in England are created for the use of a congregation, to be in as strict connexion as is practicable with the Established Church of Scotland, no person is entitled to be a minister of the meeting-house whose opinions or acts constitute a disqualification for the ministry of that Church; and the fact that the meeting-house is locally situated beyond the jurisdiction of that Church is immaterial. *Ib.*

33. In determining the question, whether a particular minister was disqualified as a minister of the Established Church of Scotland, the Court considered whether the acts of such minister had brought him within the predicament, which, according to the terms of a declaration of the General Assembly of that Church, constituted a dissolution of his connexion with it, without determining whether the sentence of a particular presbytery, depriving him of his licence, was or was not conclusive as a disqualification. *Ib.*

34. A cestui que trust discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it, merely on the ground that he abstained from making such complaint until long after he first knew of it. *Phillipson v. Gatty, Gatty v. Phillipson*, vii. 516

35. Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys, upon his personal security, and that the trustees were willing to make the loan, with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject:—*Held*, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place. *Ib.*

36. *Held*, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted. *Ib.*

37. It was not necessary to decide the simple case, whether, if the daughter had

permitted the son, in the belief that the daughter assented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit, which the son might have, as against the daughter; for, in this case, the letters of the son to the mother, requesting the loan, and upon which the mother's consent was given, proposed not to affect the daughter's rights as against the trustees. *Ib.*

38. An investment by trustees of £2,183 trust funds, which they were empowered to lend on real security, in a mortgage of house property in a town, occupied for commercial purposes, and valued at £2,800, a value also, in some measure dependent on the performance of covenants,—*held* not to be justified. *Ib.*

39. Where trustees, having power to invest on Government or real security, and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking—it was *held*, that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock. *Ib.*

40. Where trustees lent the trust-moneys to one of the cestuis que trust upon a contract which constituted a breach of trust, the Court, in a suit by the trustees against all the cestuis que trust, refused, as against the cestui que trust who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract. *Ib.*

41. Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased. *O'Reilly v. Alderson*, viii. 101

42. Although taking up his permanent residence abroad in such a case does not ipso facto deprive a trustee of his office, yet it is such a disqualification as entitles the cestui que trust to have a new trustee appointed in his place. *Ib.*

43. It is the duty of trustees having power to appoint new trustees, to make such appointment impartially as between their cestuis que trust, and not without communication with them. *Ib.*

44. Decree as between the claimant of property and the trustee who claimed to hold the same property in trust for an infant defendant, reserving the right of the infant defendant. *Elsey v. Lutyens*, viii. 159

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45. Position, duty, and liability of a trustee for infants of an estate created by an invalid deed, or a deed of doubtful validity, and which is impeached by other parties. *Ib.*

46. A power to appoint a new trustee in the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee; and therefore a trustee, who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust, within the meaning of the power. *In the Matter of Watt's Settlement, and of the Trustee Act, 1850, and the Stat. 1 Will. 4, c. 60.* ix. 106

47. Where there are several trustees, one of whom is out of the jurisdiction, and a new trustee is appointed by the Court in his place under the Trustee Act, 1850, an order vesting the trust in the new and continuing trustees will, under the 10th section of that Act, have the effect of severing the joint-tenancy—*semble*, *Ib.*

48. The Court has not jurisdiction under the Trustee Act, 1850, to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising, and willing to exercise, the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. *In re Hodson's Settlement, and of the Trustee Act, 1850,* ix. 118

49. Form of order appointing a trustee in the place of a trustee out of the jurisdiction, where there is another and continuing trustee, and the vesting order is not made. *In re Player's Trust, and of the Trustee Act, 1850,* ix. 22

50. A suggestion by the trustees of a fund, that the administrator of one of the cestui que trusts who, in that character was entitled to a distributive share of the fund, had unfairly obtained the letters of administration under which he claimed such share, is no defence in this Court to the claim of the administrator; nor is it a defence for trustees to suggest that a deed, under which the plaintiff derives his title from the cestui que trust, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed, upon a suggestion in the answer of defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal

title to receive the fund; for the Court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit. *Devey v. Thornton,* ix. 222

51. It is not, necessarily, sufficient, to entitle trustees to their costs of a suit, that they have acted under the advice of counsel. *S. C.,* ix. 232

52. Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee and cestui que trust; and, therefore, a trustee who deems himself to be or is assailed by imputations cast upon him by his cestui que trust, is not justified in refusing to do an act which his trust requires, until he receives an apology from the cestui que trust; and if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty. *Moore v. Prance,* ix. 299

53. A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interest of the cestui que trusts; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial. *Harrison v. Randall,* ix. 397

54. The existence of a suit in which an appointment of trust-funds made in execution of a power is brought before the Court, and directions consequential thereto are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust-funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts, if they involve a breach of trust less excusable. *Ib.*

55. A trustee, who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act. *Harrison v. Randall,* ix. 407

56. Order by the Vice-Chancellor,—and not by the Court sitting in bankruptcy,—for the appointment of new trustees in the place of a bankrupt trustee, and the payment of the trust funds to such new trustees, under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 130. *In re Heath,* ix. 616

57. The non-interference of the trustees

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for a long period does not preclude them or their representative from sustaining a suit for carrying the trust into effect, so long as the trust subsists. But, *semble*, on the contrary, it is the duty of trustees or their representative to take steps for enforcing the trust. *Hughes v. Wells*, ix. 749

58. A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—*Held*, to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the Court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated. *Russell v. Jackson*, x. 204

59. Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially. *Ib.*

60. In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to shew to what part of the property the trust does not extend. *Ib.*

61. A reason for not appointing a person to be a trustee, may not be a ground to remove him if already appointed. *Att.-Gen. v. Clapham*, x. 613

62. A direction by a testator that his trustees shall stand seised and possessed of his real and personal estate upon trust to raise and pay an annuity, and subject thereto to raise out of his real and personal estate a sufficient sum to make up, with what his daughter A. had received on her marriage, an amount equal to the property his other children would be entitled to under his will; and a devise of all his real estate and the residue of his personal estate to his other six children, as tenants in common, and until a sale of all his real and personal estate should be made; and in order that no such sale should be required to ascertain the amount of the share of his daughter A., he authorised his trustees, if they should think fit, to cause a valuation to be made of his real and personal estate, and according to its amount, after deducting debts, &c., to fix the share of his daughter A., which should be accepted by her; with a further

direction, that she should not be entitled to any interest on her share, until each of his other children had received interest on a sum equal to the amount previously advanced to her; and that no valuation should be required to be made until each of the other children had received such equal sum; and a clause declaring that the receipts of the trustees shall be sufficient discharges for any money payable to them under his will, and that the person paying it shall not be liable to ascertain the necessity or regularity of any mortgage, sale, or disposition under the trusts of the will:—*Held*, that the trustees had a power of sale of the whole real estate of the testator, which it was at their discretion to exercise in case they did not think fit to proceed by way of valuation. *Bird v. Fox*, xi. 40

63. The testator, at the time of his death, had about £3,000 in the hands of his bankers, and the executors paid some moneys, which they received on account of the estate, to their account at the same bank, and drew out such sums as they required. About nine months after the death of the testator, the bankers became bankrupt, £2,000 belonging to the estate in their hands, of which £1,000 was ultimately lost by the bankruptcy. The Master, on a reference, thereupon found "That there were not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it, with the bankers;" but the Court held that they were not answerable for the loss. *Johnson v. Newton*, xi. 160

64. The testator gave his property to C. and D., upon various trusts, and among others upon trust for sale, and empowered C. and D., and the survivor of them, his heirs, executors, &c. to give receipts for the purchase-money, and concluded by appointing his wife, and C. and D. "trustees and executors" of his will:—*Held*, that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with C. and D. under the specific trusts of the will. *Sidebotham v. Watson*, xi. 170

65. Where there was a devise and bequest of freehold and other property, and all other the testator's real and personal estate, to two persons, their executors and administrators, upon trust, by sale or otherwise, at their discretion, to raise and invest a certain sum of money, and apply the interest in the maintenance and education of the testator's daughter, until her age of twenty-one, and then to pay the same to her for her separate use; one of the devisees in trust after the death of the other, but during the lifetime of the daughter, and whilst, therefore, it was necessary that the charge should be

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raised, proceeded to sell the estate:—*Held*, on an objection to the title, that the surviving devisee in trust might exercise the option of selling, and the power of sale; and that an application in such a case for the direction of a Court of equity was unnecessary. *Lane v. Debenham*, xi. 188

66. Commissioners having, before the passing of the Municipal Act (5 & 6 Will. 4, c. 76), been empowered by a local Act of Parliament to levy rates not exceeding 2s. in the pound in any one year, for paving, lighting, watching, and improving the streets of a town, were, by the Municipal Corporation Act, relieved of the duty of watching, and were, by the effect of the same Act, prevented from levying rates of more than 1s. 3d. in the pound in any year:—*Held*, that although, if the powers of the commissioners had been sought to be affected by a private Act, they might have applied funds raised by them under their Act in opposing such intended private Act, yet they could not apply any such funds in soliciting a new Act to obviate the consequences of the public general Act, or to extend the powers originally given to them by their local Act. *Att.-Gen. v. Eastlake*, xi. 205

67. The representative of a deceased trustee, who is called upon to transfer the trust property to new trustees, is not entitled to be furnished, at the expense of the fund, with a duplicate of the instrument appointing such new trustees, nor is he entitled, at the expense of the fund, to an attested copy of the deed creating the trust. *Warter v. Anderson*, xi. 301

TRUSTEE OUT OF THE JURISDICTION.

See STATUTES, CONSTRUCTION OF, 1 Will. 4, c. 60.

TRUSTS ACT.

See TRUSTEE AND CESTUI QUE TRUST.

TURNPIKE ROAD.

See CONTRIBUTION.

Personal liability of the trustees of a turnpike road, who exceed the powers given them by their Act in borrowing money on the credit of future or expected tolls. *Wilson v. Goodman*. iv. 62

UNCERTAINTY.

See ABSOLUTE INTEREST—DESCRIPTION—DEVISE—LEGACY.

1. A bequest will not be held void for VOL. XI.

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uncertainty, although the meaning be not absolutely certain, if the Court can arrive at a reasonable degree of certainty. *Adams v. Jones*, ix. 485

2. Where a legacy was given to a legatee by the name and description of "C. H., the wife of A.," H. being in fact the wife of A., and C. H. his daughter, an infant of tender years, the Court would not presume that there was any mistake in the preparation of the will; and, it being more probable that the testatrix had mistaken the name than the description of the legatee, the Court held that the legatee intended was reasonably certain, and decreed the legacy to be paid according to the description and not according to the name. *Ib.*

3. Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at Nisi Prius, the defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning—dismissed without costs, on the ground that the agreement was framed in terms which were incapable of any certain construction. *Tatham v. Platt*, ix. 660

UNCLAIMED DIVIDENDS.

See PLEADING.

UNDERTAKING.

See APPENDIX, vol. ix, p. xci—JOINT-STOCK COMPANY.

UNDERTAKING TO SPEED.

See REPLICATION.

UNDUE INFLUENCE.

See SOLICITOR AND CLIENT.

Where a promissory note appeared to have been signed by a lady, in her twenty-second year, as surety for her step-father, in whose house she had been residing with her mother for many years previously, the Court restrained execution against her on a judgment obtained by the payee. *Espey v. Lake*, x. 260

UNITARIAN CONGREGATIONS.

A bequest for the assistance of Unitarian congregations held to be valid, and the trust directed to be carried into execution. *Shrewsbury v. Hornby*, v. 406

USURY.

An agreement made upon the occasion of 613 s s

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the intended transfer of a mortgage, that the interest of the mortgage-money, at £5 per cent. (to be reduced to £4 per cent. if paid within a limited time), should run from the date of the proposed transfer, being the date of the deed of transfer, although, owing to the mortgagor being then unprepared to procure the execution of that deed, the mortgage-money, which was then ready to be advanced, was not actually advanced until a subsequent time: —*Held*, not to be usurious—less than £5 per cent. having, in fact, been taken, the transaction being *bonâ fide*, and there having been no absolute reservation of more than £5 per cent., but only a reservation from the burden of which the mortgagor might, at his option, have discharged himself. *Long v. Storie*, ix. 542

VACATION.

See *PRO CONFESSO*—TIME.

VALUABLE CONSIDERATION.

Semble, the mutual concurrence of a husband and wife in the levying of a fine of lands in which they were jointly interested, and in the declaration of the uses for the benefit of their issue, constitutes a valuable consideration to support the deed declaring such uses. *Parker v. Carter*, iv. 409

VALUATION.

See *ACQUIESCENCE*.

VALUATION OF BUILDINGS.

See *TITHES*.

VARIATION OF ORDER.

See *ORDER*.

VENDOR AND PURCHASER.

See *ACQUIESCENCE*—COMMON LANDS—CONDITIONS OF SALE—COSTS—DEMUR-
BER—JOINT-STOCK COMPANY—LAND
TAX REDEMPTION—LESSOR'S TITLE—LIS
PENDENS—MINING SHARES—NOTICE—
ORDER—POWER OF SALE—SHIP—SOLI-
CITOR—SPECIFIC PERFORMANCE—STA-
TUTES, CONSTRUCTION OF, 3 *g* 4 *Will*. 4,
c. 27—TENANT FOR LIFE AND REMAIN-
DERMAN—TITLE—TRUSTEE—TRUSTEE
AND CESTUI QUE TRUST—WASTE.

1. Where an estate was directed by the testator to be sold after the death of a certain person, and the sale was made during the life of that person, under a decree, some of the persons interested in the proceeds

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being infants or not *sui juris*, the Court would not compel the purchaser to accept the title. *Blocklow v. Laws*, iv. 40

2. The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale,—such circumstance being entirely collateral to any question of title. *Borrel v. Dan*, iv. 440

3. A sale of the estate of an insolvent debtor, made *bonâ fide*, at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity, only because the purchaser, after the sale, but before the conveyance, had notice of circumstances attending the conduct of the sale by the assignees amounting to negligence on their part. *Ib.*

4. A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, and obtained an injunction restraining the vendor from suing him for the purchase-money, part of which was afterwards ordered to be paid into Court to abide the event of the suit. The bill was dismissed: —*Held*, that the vendor was entitled to the residue of the purchase-money, and the interest upon it to the time of payment, although the purchase-money in court had not been laid out, and no interest, therefore, had accrued thereon. *Humphreys v. Horne*, iv. 276

5. The purchaser of a real estate became insolvent after part, but before the whole, of the purchase-money was paid, or the conveyance executed. The vendor died, having devised the estate to the plaintiffs, and appointed one of them his executor. The bill was filed against the provisional assignee of the insolvent, and an equitable mortgagee by deposit of the agreement for purchase; and it prayed the payment of the residue of the purchase-money by the defendants, or by sale of the estate. The plaintiffs did not prove their title as devisees. The defendants disclaimed:—*Held*, that the Court could not make the decree sought without evidence of the devise; but that, upon payment of the costs of the defendants, the Court might (the defendants not opposing) declare the plaintiffs absolutely entitled to the estate. *Gabriel v. Sturgis*, v. 97

6. Reference as to title directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had

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long expired, and he had given notice of his intention to rescind the contract. *Wood v. Machu*, v. 158

7. Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned. *Ib.*

8. The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice, where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Ib.*

9. Reference of title, upon motion by the plaintiff (the vendor) after answer, notwithstanding the question in dispute in the cause might have been conveniently determined by the Court at the hearing, without a reference. *Curling v. Flight*, v. 248

10. Whether the question in a cause be, what evidence of title the vendor is bound to give; or whether he is able to give sufficient evidence,—the question is equally one of title, and the proper subject of a reference. *Ib.*

11. Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet," and in the particulars of the lot described it only as "sixty-five acres two roods and twelve perches of growing timber." It appeared, on the evidence for the plaintiff, that the average size of the trees was about thirty-five feet, but on that for the defendant that it was only about twenty-two feet; and the defendant moreover alleged that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale:—*Held*, that, as the representation on the particulars of sale had proved to be incorrect, and as it was not shown that the defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained)

it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed. *Lord Brooke v. Rounthwaite*, v. 298

12. If a vendor contract with two different persons for the sale to each of them of the same estate, the Court will, *prima facie*, enforce the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of the second contract, the Court will, in a suit for specific performance by the first purchaser against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff. *Potter v. Sanders*, vi. 1.

13. A purchaser offered a price for an estate, and the vendor, by a letter sent by post and received by the purchaser the day after it was put into the post-office, accepted the offer:—*Held*, that the vendor was bound by the contract from the time when he posted his letter, although it was not received by the purchaser until the following day. *Ib.*

14. Sale and assignment of a life interest in leaseholds, in consideration of a weekly sum to be paid to the vendor during her life, with a covenant by the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease:—*Held*, that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment, for the weekly payment. *Mathew v. Bowler*, vi. 110

15. A bidder at a sale under the decree of the Court, who is not a party to the cause or interested in the estate which is the subject of the sale, has no right to apply to the Court to set aside a sale to another bidder on the ground of irregularity, in that the latter, although reported the purchaser, was not, in fact, the highest bidder. Whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser—*quarre*. *Hughes v. Lipscombe*, vi. 142

16. When the vendor's bill for specific performance is dismissed on the ground of his laches in instituting the suit, and without any decision on the question of title, the Court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies. *Southcomb v. The Bishop of Exeter*, vi. 225

17. Premises were advertised to be sold according to certain printed particulars and

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conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solicitor, who introduced, in writing, a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction-room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer (inadvertently), and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor without a reservation of the right of way; and the bill was dismissed, without costs. *Manser v. Buck*, vi. 443

18. The vendor's bill, in a suit for specific performance of an agreement to take an assignment of a lease, stated a covenant in the lease not to assign without the license of the lessor, but did not aver that the plaintiff had or could obtain such a license:—*Held*, upon demurrer, that the Court, at the hearing of the cause, upon such facts, would not dismiss the bill, but would refer it to the Master to inquire whether the vendor could make a good title; and that the demurrer must, therefore, be overruled. *Smith v. Capron*, vii. 185

19. If the boundary of property contracted to be purchased can be certainly defined, whether the extent be more or less, the purchaser will be bound by the contract; but whether he will be so bound if the boundary depends on a plan or instrument which is so vague as not to admit of legal construction—*quære*. *Monro v. Taylor*, viii. 51

20. A contract by a lessee under an ecclesiastical corporation, whilst he was in treaty with the corporation for the renewal of his lease, to sell the leasehold premises, does not necessarily throw upon him the obligation of procuring the renewal of the lease at his own expense, for the benefit of the purchaser; whether, if the vendor after the contract procure such renewed lease, the purchaser is not entitled to take it without bearing the expense of the renewal—*quære*. *Ib.*

21. B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence; but the vendors' solicitor required B. to sign the agreement, and declined to substitute the name of C.

Communications afterwards took place between the vendors' solicitor and C., with reference to the title. The vendors afterwards brought their bill against B. and C. for specific performance of the contract:—*Held*, that, supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it. *Chadwick v. Maden*, ix. 188

22. That the communication between the vendor's solicitor and the solicitor of C. with reference to the title, was not an adoption of C. as the purchaser in the place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party. *Ib.*

23. That the bill of the vendors having been dismissed against C., at his instance, C. would not be allowed to set up, in a suit by B. against himself, that the decree against B. in the suit of the vendors had been improperly obtained in his absence. *Ib.*

24. That the acceptance of the title by C. in such communications would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right, as claiming through B., and not as agent for B. *Ib.*

25. A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise, if he claim merely as a sub-purchaser—*Semble*. *Ib.*

26. After a sale by auction of a messuage and lands, one of the conditions of which was, that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but (except where otherwise provided for by the conditions) a compensation should be given or taken, to be settled by two referees, or an umpire,—it was found that one of the lots contained about twenty acres more, and another about ten acres less, than the quantity of land described in the particulars:—*Held*, that, upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract. *Leslie v. Thompson*, ix. 268

27. That the excess of the quantity of land in one of the lots, and the deficiency in the other, were both subjects of compensation within the condition; and that the Court would, if necessary refer it to the Master to settle the amount of such compensation, notwithstanding that, from the variety in the nature of the different por-

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tions of the land in which the variations occurred, there was no uniform standard for computing such amount. *Ib.*

28. That, whether a vendor could, or could not, in equity be relieved, on the ground of mistake, from a contract for the sale of lands inaccurately described as to quantity, and which description has been prepared by his solicitor from former particulars and conditions relating to the same property, drawn up by another solicitor on the report of a surveyor,—equity would not, in such circumstances, enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation. *Ib.*

29. The actual designation, in the particulars of the property offered for sale, of the number of acres contained in a lot—*Held*, to negative the presumption of any intention on the part of the vendor to sell the estate in the lump. *S. C.*, ix. 273

30. On a contract for the sale of lands, described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was *held*, that, upon the particulars and conditions, the contract for the land and timber was one contract, and not separate contracts; and that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, and therefore subject to the rights of the lord, and the restrictions of the custom. *Crosse v. Lawrence*, ix. 462

31. Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the Court will not enforce the latter contract unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it; but, if an entire contract be made for the sale, both of the estate and the timber (notwithstanding the purchase-money is made up of distinct sums for each), the vendor is only bound to make out his title to the land according to the contract; and the title to the land is the title to the timber upon it. *Ib.*

32. The purchaser of undistinguished freehold and copyhold land and timber, under a single and entire contract, must be considered as estimating, in the price he pays for the land, the price he pays for the timber. *S. C.*, ix. 467

33. Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase-money, the vendor gave the purchaser the opportunity of investing the

purchase-money, in consols in the joint names of the vendor and purchaser, provided the investment was made by a certain day, and the purchaser made the investment accordingly:—*Held*, that the vendor, having proposed the investment, could not have charged the purchaser with the loss, if the funds had fallen, and that the vendor was entitled to the benefit accruing from the funds having risen. *Burroughes v. Browne*, ix. 609

34. A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money; and if he makes a payment to or on account of the vendor in respect of the purchase-money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make. *Ib.*

35. The Court may not decree specific performance of a contract for the sale of a reversion, if the vendor had misled the purchaser by stating that it was subject to a lease containing all the usual covenants for repairs, &c., the vendor knowing, at the same time, that there was no person against whom the covenants could be enforced; but where property is sold subject to a lease so described, and tenants are in possession of the property, and pay their rent according to the terms of the lease, and the vendor is not aware, at the time of the contract, of any difficulty in enforcing the covenants, the Court will not refuse to decree specific performance, on the ground that the vendor cannot show upon whom the liability of the covenants in the lease has devolved; and the vendor is not bound to find out, and acquaint the purchaser with, the name of the party who may be liable to such covenants. *Flint v. Woodin*, ix. 618

36. Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. *Ib.*

37. A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract; or if, after such knowledge, he treats the contract as subsisting, he will be considered to have waived the objection. *Ib.*

38. Though the auctioneer at a sale by auction is the agent of the purchaser, yet he is not his agent for all purposes; and there is no reason why he may not sell property of which he is himself the owner—*Semle*. *Ib.*

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39. An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract, but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—*Held*, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word “sufficient” was connected with the word “proper;” that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that releasees to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the Court, are required to covenant for their own acts only: and that the Court would not compel the purchasers, who were only releasees to uses,—especially after the uses were executed by the statute,—to enter into such covenants. *Onslow v. Lord Londesborough*, x. 67

40. A railway company contracted with the owner of lands to pay interest for the purchase-money, and compensation to be awarded for so much of the lands as should be taken for the railway; and it was agreed that the money should be deposited in a certain bank until the completion of the purchase, and that the interest should be paid to the owner up to and inclusive of the day on which the purchase should be completed:—*Held*, that the reasonable construction of this agreement was, that it referred to the completion of the purchase by the purchaser; that, on the part of the purchaser, the purchase was completed by the payment of the purchase-money into Court; and that it did not necessarily refer to the complete conveyance of the estate, and the final settlement of the purchase. *Lewis v. The South Wales Railway Company*, x. 113

41. A covenant by the lessee to insure the demised premises in the names of himself and the lessor,—although not performed literally, by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the

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lessor, that he could not recover for a breach of the covenant,—the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, and which he is at liberty to dispense with:—*Held*, therefore, that the circumstance that the original lessee could not be found, and that no insurance could be effected in his name, was not an objection to the title of an underlessee. *Havens v. Middleton*, x. 641

42. A landowner agreed to sell land to a railway company, and the company, requiring immediate possession of it, offered to deposit the purchase-money in a certain bank in the joint names of the vendor and the chairman of the company, pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, and stipulated also that he should be paid £5 per cent. interest from the time possession was given. The deposit was accordingly made, and possession taken by the company. Before the conveyance was completed, the bankers with whom the money stood became bankrupt, and most of it was lost:—*Held*, that the loss must be borne by the vendor, the deposit having been made and accepted as payment, and not merely as security. *Sir Horace St. Paul v. The Birmingham, Wolverhampton, and Stour-Valley Railway Company*, xi. 305

43. A railway company, having purchased and taken an assignment of the interest of a leaseholder in certain premises, also took, under their compulsory powers, the interest of the freeholder in the same premises, and paid the amount of the valuation of such interest, and compensation for injuriously affecting the other adjacent property of the freeholder, into court. The freeholder afterwards objecting to the formation of a coal depôt on the premises which had been so taken,—not having executed any conveyance of the property to the company,—brought his action against the company, treating them as assignees of the lease,—for damages, upon the covenants therein; but the Court restrained the action without prejudice to any proceedings against the company, in which their title as owners of the land should be admitted. *The East and West India Docks and Birmingham Junction Railway Company v. Dawes*, xi. 363

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The influence upon the minds of the jurors, which might possibly be produced by the reputation of a material witness on a trial, in affecting the relative credit to be given to the testimony of that and the other witnesses, is no ground for changing the venue from the county or neighbourhood

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in which such material witness resides and is best known. *M'Gregor v. Topham*, iii. 488

VERDICT AT LAW.

See INJUNCTION—OUTSTANDING TERM—SETTING DOWN CAUSE—SPECIFIC PERFORMANCE.

VESTED INTEREST.

See CONSTRUCTION—LEGACY—WILL.

VESTED LEGACY.

See LEGACY.

VESTING.

See CONSTRUCTION—DEVISE—LEGACY.

VICE-CHANCELLOR.

See JURISDICTION.

VISITOR.

See JURISDICTION.

VOID DEVISE.

See DEVISE—REMOTENESS.

1. Upon the marriage of the testator and the testatrix, certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, and, in default of issue of the marriage, to the use of the survivor of the husband and wife, and his or her heirs and assigns. The testator, by his will, made during the coverture (having other estates not in settlement), devised all his real estates to the testatrix for her life, and, upon her decease, to the use of A., B., and C., in trust for sale, and out of the proceeds of such sale, and the residue of his personal estate, to pay certain legacies, and subject thereto to stand possessed of one-fourth part of the said trust-moneys, for such purposes as the testatrix should appoint, and, in default of appointment, for her next of kin; and to pay and dispose of the other three-fourths equally amongst A., B., and C., their executors, administrators, and assigns. The testator died in the lifetime of the testatrix, leaving no child of the marriage. The testatrix, by her will, made in 1839, after the death of A., B., and C., reciting, that she believed it was the testator's wish that the settled estates should pass by his will, and she was desirous of fulfilling his wishes, devised the settled estates to the uses by the testator's will declared concerning the same, and in exercise of the power of appointment given to her by the testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, and directed her real estate to be sold and fall into such residue, which she bequeathed to several legatees:—*Held*,

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that there being, in the events which happened, no uses declared of the settled estates by the will of the testator, the specific devise of such settled estates by the will of the testatrix was void, or incapable of taking effect. *Culsha v. Cheese*, vii. 236

2. That the heir-at-law of the testatrix did not take the settled estates as the subject of a void or ineffectual devise; but that, under the Wills Act (7 Will. 4 & 1 Vict. c. 26), the settled estates passed by the residuary devise in the will of the testatrix, for the benefit of her residuary legatees,—the case not being one in which a contrary intention appeared, within the meaning of that statute. *Ib.*

VOID LIMITATION.

See CONDITION.

VOID PROVISIO.

See WILL.

VOID TRUST.

See CHARITY—TRUSTEE AND CESTUI QUE TRUST.

VOLUNTARY ASSIGNMENT.

See TRUST.

1. M., who in the event of surviving her daughter, and of the death of her daughter without issue, would, as next of kin, be entitled to a fund, which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment, as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue; and the husband filed his bill against the trustees and M. to compel the performance of the trust:—*Held*, that the voluntary assignment did not create a trust which a Court of equity would enforce; and the bill was dismissed. *Meek v. Kettlewell*, i. 464

2. The Court, in the administration of assets, enforced against the estate voluntary assignments made by the testator of annuities, mortgage debts, and policies of assurance, of which assignments no notice had been given in his lifetime to the mortgagors or grantors, such assignments containing covenants for further assurance by the testator, his executors, and administrators. *Cox v. Barnard*, viii. 310

VOLUNTARY BOND.

See ADMINISTRATION SUIT—EXECUTOR.

VOLUNTARY DEED.

See FAMILY CONTRACT.

1. The testator, by a voluntary deed, covenanted with trustees, that, in case A

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and B., his two natural sons, or either of them, should survive him, his (the testator's) executors and administrators should, within twelve months after his death, pay to trustees named in the deed £60,000, upon trust for such of them (A. and B.) as should attain twenty-one and be living at the time of his death; and if neither of them, having survived him, should attain twenty-one, then upon trust for him (the testator), his executors and administrators. The testator retained the deed in his own possession until his death, and did not communicate it either to the trustees or to A. and B. The testator, by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. and B., and his legitimate children. After the death of the testator, the deed of covenant was found amongst his papers. A. survived the testator, and attained twenty-one:—*Held*, that, although the deed of covenant was voluntary, it nevertheless created a trust for A., and that the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator. *Fletcher v. Fletcher*, iv. 67

2. That the deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor. *Ib.*

3. That the retention of the deed in the possession of the covenantor, and the absence of communication respecting it to the trustees and the cestuis que trust, did not affect its validity. *Ib.*

4. Equity will assist a party claiming under a voluntary deed of covenant, by enabling him to use the deed either at law or in this Court. *S. C.*, iv. 78

5. A conveyance in the form of a purchase-deed, for valuable consideration, but in fact voluntary, not supported against a prior voluntary conveyance made by the same party. *Roberts v. Williams*, iv. 130

6. *Semble*, the heir-at-law of the author of a voluntary deed cannot avoid the deed under the statute 27 Eliz. c. 4, by a conveyance for value. *Parker v. Carter*, iv. 409

VOLUNTARY INSTRUMENT.

A lady, who had lent a sum of money on an equitable mortgage by a deposit of title deeds, signed a memorandum accompanying the deposit, which expressed that the mortgagor should pay off the mortgage debt by certain quarterly instalments, and after paying a specified amount to the mortgagee, should invest the remaining instalments in Consols for the benefit of the children of A. The mortgagee subsequently signed another memorandum, directing the mortgagor to continue to pay

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the instalments of the debt to her, and not invest them in Consols as before directed. Both of these documents were made in the handwriting of the mortgagor, under the directions of the mortgagee, and the mortgagor thereby had notice of them; and it was *held*, in a suit for the administration of the estate of the mortgagee, that, by the effect of the first memorandum and the notice thereof to the mortgagor, he became a trustee for the children of A. of the monies directed to be invested in Consols; and that the first memorandum constituted a voluntary declaration of trust, which the mortgagee could not revoke, and to the benefit of which the children of A. were entitled as against the next of kin of the mortgagee. *Paterson v. Murphy*, xi. 88

VOLUNTARY PROMISE.

A testator, having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted, in respect of a portion of the property, according to the intention thus expressed; and with the assent of the other children, and at a valuation approved by them, he became the purchaser of a house and premises, part of the estate:—*Held*, with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and divide it amongst the brothers and sisters, and that as such promise it was nudum pactum, and did not amount to a declaration of trust in their favour. *Dipple v. Corles*, xi. 183

WAGES.

See SHIP.

WAIVER.

See CONDITIONS OF SALE—CONTEMPT—COSTS—PLEADING—SPECIFIC PERFORMANCE.

WARRANT FOR TAXATION.

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WASTE.

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1. The Court, by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created. *Marker v. Marker*, ix. 1

2. In the preservation of ornamental timber, the protection of the Court is confined to timber planted and left standing

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for shelter or ornament; and the question whether the protection should be extended to particular timber, is, therefore, one of fact, and the determination must depend upon the evidence which can be collected to establish the fact. *Ib.*

3. Where a tenant for life without impeachment of waste had sold a quantity of timber trees, which the Court afterwards restrained him from felling, on the supposition that it would be equitable waste, the Court held that the purchasers of the timber were not necessary parties to the injunction suit, but required the plaintiff to give security to the defendant, not only for the value of all the trees which the defendant should be prevented from cutting by the injunction, but also for any loss or damage the defendant might incur or sustain by reason of his being prevented from completing the sale. *Ib.*

WATERCOURSE.

See ACT OF PARLIAMENT.

WIDOW.

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WIFE.

A bequest of an annuity to the testator's nephew for life, or until his bankruptcy or insolvency, and after his decease, bankruptcy, or insolvency, to be paid to his wife, for the personal support of herself, her husband, and his children, during the life of his nephew and his wife, and the survivor of them; and in case they, or either of them, should attempt to alienate the annuity, the trustees to be empowered to apply it towards the support of their children. The first wife of the nephew, to whom he was married before the date of the will, survived the testator, and the gift of the annuity was held not to extend to the widow of the nephew who was his second wife. *Boreham v. Bignall*, viii. 131

WILL.

See ABSOLUTE INTEREST—ANNUITY—APPENDIX, vol. x, p. xxxii—CHARITABLE BEQUEST—CHARITABLE TRUST OR USE—CONSTRUCTION—CONVERSION—DEVISE—ELECTION—EVIDENCE—HEIR AT LAW—LEGACY—LEGAL ESTATE—MAINTENANCE—MISTAKE—NEXT OF KIN—PARTNERSHIP—POWER—REMOTENESS—REVOCATION—STATUTES, CONSTRUCTION OF, 7 *Will.* 4 § 1 *Vict.* c. 26; *Id.* ss. 3, 24, 33—VOID DEVISE—VOLUNTARY DEED.

1. The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the con-

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sent of his mother;"—*Held*, that the son took an absolute interest in the house. *Green v. Hurvey*, i. 428

2. Under a gift by a testator to his wife of his residuary personal estate, to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Raikes v. Ward*, i. 445

3. A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife. *Adams v. Adams*, i. 537

4. Gift of a residue of real and personal estate to trustees to sell, get in, and pay and divide the money arising therefrom, unto and equally among the testator's children, so soon as the youngest should attain twenty-one,—the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of the testator's children equally, and, in case of the death of any of his children leaving lawful issue, the testator gave to such issue the share the parent would have been entitled to have:—*Held*, that the residuary share of a child, who attained twenty-one, and died before the time of division, passed to his representatives. *Leeming v. Sherratt*, ii. 18

5. That no child, who did not attain twenty-one, was intended to take any interest in the residue—*semble*. *Ib.*

6. That the word "survivors" in the residuary clause, must be construed in its natural sense, and not as importing "others;" and that this construction of the word in one part of the will must govern the construction of the same word in the other part. *Ib.*

7. That the gift of the part or share of a parent dying leaving issue, to such issue, applied both to the original and accruing shares of the residue, but not to the particular legacies. *Ib.*

8. The testator gave his real and personal estate in trust for his nephew John for life, and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator, and their sons successively; and in case none of them, the said three nephews, should have a son who should survive the survivor of them,

VOLUNTARY DEED.

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WILL.

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sent of his mother;"—*Held*, that the son took an absolute interest in the house. *Green v. Harvey*, i. 428

2. Under a gift by a testator to his wife of his residuary personal estate, to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Raikes v. Ward*, i. 445

3. A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife. *Adams v. Adams*, i. 537

4. Gift of a residue of real and personal estate to trustees to sell, get in, and pay and divide the money arising therefrom, unto and equally among the testator's children, so soon as the youngest should attain twenty-one,—the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of the testator's children equally, and, in case of the death of any of his children leaving lawful issue, the testator gave to such issue the share the parent would have been entitled to have:—*Held*, that the residuary share of a child, who attained twenty-one, and died before the time of division, passed to his representatives. *Leeming v. Sherratt*, ii. 18

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6. That the word "survivors" in the residuary clause, must be construed in its natural sense, and not as importing "others;" and that this construction of the word in one part of the will must govern the construction of the same word in the other part. *Ib.*

7. That the gift of the part or share of a parent dying leaving issue, to such issue, applied both to the original and accruing shares of the residue, but not to the particular legacies. *Ib.*

8. The testator gave his real and personal estate in trust for his nephew John for life, and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator, and their sons successively; and in case none of them, the said three nephews, should have a son who should survive the survivor of them,

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and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters:—*Held*, that the testator in the words of devise to the fourth nephew must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one—a different construction being repugnant to specific directions as well as to the general scheme of the will—creating cases of intestacy—and supposing a capricious and irrational intention; and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Hillerson v. Lowe*, ii. 355

9. Circumstances in which one testamentary instrument is held to be in substitution for, or a mere repetition of, another. *Suisse v. Louther*, ii. 424

10. Before the Court can resort to the context of a will, in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import. *Walker v. Tipping*, ix. 800

11. Cases in which the Court, in construing a will of personalty, will look at the original will as well as the probate copy. *Oppenheim v. Henry*, ix. 802, n.

12. A devise of real estate to the four sons of the testator as tenants in common, and a bequest of residuary personal estate, in trust for the same four sons, in like manner, to be vested in them as to one moiety as they should respectively attain twenty-one years of age, and as to the other moiety when the youngest should attain that age, and in case any son should die before the respective moieties of his share should become vested, then the unvested share which should belong to the son so dying, and also his accrued share, to go to the others of the testator's sons as tenants in common, and to become vested at the times aforesaid; and in case all his sons should die under twenty-one, then to the testator's right heirs; and the testator appointed his executors guardians of his sons, and empowered such guardians to receive the rents and profits of the respective shares of his sons in the said real estate during their minorities, for their maintenance, education, and advancement:—*Held*, that the sons took an immediate and vested interest in their respective shares in the real and personal estate, but liable to be divested by their death before the time at which the testator declared they should respectively be vested, payable, or transferable. *Poole v. Bott*, xi. 33

13. The will contained a proviso, that in case any one of the testator's sons should

marry or illegally cohabit with certain of their cousins, then and in every such case, as well the original as every accruing share or shares of the said son or sons so intermarrying or illegally cohabiting as aforesaid, should go over and be in trust for all and every the person or persons, who, under the trusts and directions of the will, would have been entitled thereto, in case the son or sons so intermarrying or illegally cohabiting as aforesaid had died under the age of twenty-one years; and he declared, that it should not be lawful for his trustees to pay to his sons the amount thereby bequeathed, or to permit them to enter upon the possession of the lands thereby devised, until they should have respectively given and executed to his trustees a bond in the penal sum of £20,000 that they respectively would not intermarry or illegally cohabit with their said cousins.—*Held*, that the direction with regard to the bonds would not be enforced by the Court; and the trustees were directed to transfer the residuary shares of the sons, without requiring them to enter into such bonds. *Id.*

14. A testatrix bequeathed her property to her mother for life, and at her decease gave a legacy of £200 to A., directing that then the residue should be equally divided between her surviving brothers and sisters:—*Held*, that the word "surviving," referred to the period of distribution: and the mother having died before the testatrix, that the brothers and sisters living at the death of the testatrix were entitled to the benefit of the gift; and that there was, in the events which happened, no bequest to the brothers and sisters who died before the testatrix. *Spurrell v. Spurrell*, xi. 54

15. In a will, made before 1838, a gift of "£400" stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were "residue of my property stock":—*Held*, that the will, by these words, passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will, and after the year 1838. *Banks v. Thornton*, xi. 176

16. A bequest of residuary personal estate to the testator's wife, daughter, and son-in-law (the husband of the daughter), successively for life, and, after the death of the survivor, in trust for all the children of the daughter who should live to attain twenty-one or marry, other than and except the eldest and second sons, if any, and any other child who should, by virtue of the limitations contained in the said will, be entitled in possession to the said testator's estates thereafter mentioned, or the rents and profits thereof. The estates referred to were by the said will appointed

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(subject to prior and existing limitations) to the use of the daughter for her life, with remainder to the use of her husband (the said son-in-law) for his life, with remainder to the use of the second and all and every other son and sons, other than and except an eldest son of his said daughter, successively in tail male, with remainder to the use of the first and all and every other the daughter and daughters of his said daughter successively in tail male, with remainders over. The testator's daughter left two sons and several daughters. The second son of the testator's daughter died an infant unmarried, in the lifetime of his father (the testator's son-in-law), and thereupon the eldest daughter of the testator's daughter became entitled in the said estates, under the appointment contained in the will, to an estate tail male in remainder expectant on the termination of the preceding estates (of which the life estate of her father was one) then subsisting. By a settlement made upon the marriage of the eldest daughter, and by a recovery, she, her father, her husband, and the other parties then interested in the estates, concurred in declaring new uses thereof, whereby they were limited to such uses as the father, together with a previous tenant for life, and the daughter and her husband, should jointly appoint, and subject thereto, and to the confirmation of life estates and certain existing powers and terms of years, created by the anterior settlements, so far as they were subsisting, to the use of trustees for a term of ninety-nine years, upon trust to pay the rents and profits to the said eldest daughter, for her separate use, and subject thereto, to the use of the husband and his assigns, with remainders over. The eldest daughter died in the lifetime of her father, and therefore during the continuance of his life estate, and without having herself come into possession of the settled estates, or become entitled to receive the rents and profits thereof:—*Held*, that, upon the death of the father, the husband of the eldest daughter, as her personal representative, became entitled to an equal share of the residuary personal estate of the testator, as one of the children of his daughter, notwithstanding he (the husband of the eldest daughter) became also, under the recovery and marriage settlement, entitled in possession to a life interest in the said settled estates. *Wyndham v. Fane*, xi. 287

WITNESS.

See APPENDIX, vol. x, pp. xxxii, lxxvi—
COMMISSION—DE BENE ESSE—DEFENDANT—EVIDENCE—INSPECTION—LEGACY—VENUE—VOLUNTARY ASSIGNMENT.

1. A witness, called by the plaintiff, and
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cross-examined by the defendant, before the hearing, on a point not then in issue in the cause, allowed to be examined again by the defendant on the same issue, when raised before the Master under the decree. *Whitaker v. Wright*, ii. 321

2. The plaintiff in a creditors' suit called a witness to prove the execution of a bond upon which his debt was founded. The defendant, the executor, cross-examined the witness as to the consideration. On the proving of the debts before the Master, the defendant insisted that the bond was usurious, and obtained leave to examine the witness again upon interrogatories to be settled by the Master. On a motion by the plaintiff:—*Held*, that the plaintiff was entitled to cross-examine the witness; that the application by the plaintiff for leave to cross-examine the witness was proper; that the cross-interrogatories to be exhibited by the plaintiff need not be settled by the Master. *S. C.*, iv. 412

3. Witnesses examined for the defendant, on an inquiry as to the value of an estate in fee simple, in answer to interrogatories deposed, that, subject to a certain lease in which it was comprised, the value was so much. By their affidavits subsequently they stated, that they meant to refer to the lease as beneficial to the owner of the fee simple, and not as a burden, which the examination, as taken down, would imply. On the motion of the defendant, the witnesses were allowed to be re-examined on that point, notwithstanding the defendant was himself the lessee of the estate, and had by his state of facts alleged, that the lease contained covenants which were burdensome on the owner of the fee simple. *Cass v. Cass*, iv. 278

4. On a motion, before publication, to re-examine a witness upon interrogatories which he has refused to answer, and that he may be ordered to produce a document which he has refused to produce, the witness only, and not the parties in the cause, are to be served with notice of the motion; and the rule is the same where the motion is made after publication, unless the case comes within the grounds upon which the Court guards against the re-examination of witnesses. *Tippins v. Coates*, vi. 16

5. It is not an objection to such a motion that there was an irregularity in the subpoena duces tecum, or that the required document was vaguely described in the subpoena, if the witness has appeared and submitted to be examined, and showed by his answer that he identified the document inquired after with the document in his possession. *Ib.*

6. A subpoena duces tecum is a requisition to a witness to produce a document; and an interrogatory requiring a witness to set forth a document in the words, is in

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effect equivalent to a requisition to produce it. *Ib.*

7. The duty of a witness to produce a document called for by the subpoena duces tecum, or inquired after by an interrogatory, is the same whether the document is called for in order to be proved by himself or by another witness. *Ib.*

8. A witness cannot object to answer a question because it relates to private matters, or because it is immaterial, unless the answer may be withheld on some ground of privilege. *Ib.*

9. Under the statute "for improving the law of evidence" (6 & 7 Vict. c. 85), one defendant in a suit in equity is a competent witness in the same cause on behalf of another defendant; and it is not a just exception to his evidence, that the title of the plaintiff to sustain the suit against both defendants depends upon the same issue; that fact can only be considered as affecting or tending to affect the credit of such defendant as a witness. *Wood v. Bowcliffe*, vi. 183

10. The solicitor of the plaintiffs in the cause was served with a subpoena to attend and be examined before commissioners as a witness for the defendants, and he thereupon attended and delivered to the commissioners a written refusal to be examined, on the ground of his being professionally employed by the plaintiffs:—*Held*, that such document was not properly returned by the commissioners, and ought not to have been set down as a demurrer. *Wisden v. Wisden*, vi. 549

11. That a witness who has attended to be examined, in pursuance of a subpoena, cannot then refuse to be examined, on the ground of irregularity in the service of the subpoena. *Ib.*

12. That it is not necessary to serve the other parties in the cause with a notice of motion that a witness be ordered to attend and be examined, though the reason assigned by the witness for his refusal to be examined was, that he was professionally concerned as solicitor for such other parties. *Ib.*

13. A witness, who had attended before the Examiner, but had refused to be examined unless he were paid the expenses of some former attendances, ordered, upon motion, to attend and be examined, and to pay the costs of the motion. *Gaunt v. Johnson*, vi. 551

YEAR'S WAGES.

14. After an issue had been directed (upon exceptions to the Master's report of debts in a creditors' suit) to try the consideration of a bond, the Court refused the motion of the plaintiff, the obligee in the bond, that he might be ordered to be examined and cross-examined by the respective parties, on the trial of the issue. *Hepworth v. Heslop*, vi. 622

15. *Quære*, whether, generally, any of the parties, not being a merely formal party, can be examined as a witness on the trial of an issue directed at the hearing of the cause. *Ib.*

16. *Quære*, whether the Court will, after an issue has been directed, order a party to be examined as a witness on the trial of the issue, without rehearing the matter in which the order directing the issue was made. *Ib.*

17. The Court will not make an order permitting a plaintiff in an original bill, who has subsequently become bankrupt or insolvent, to be examined as a witness in the cause for the assignees of his estate, who are prosecuting his suit by supplemental bill. *Fisher v. Fisher*, vi. 623

WRIT.

The subpoena to appear and answer is a writ to which the 20th Order of the 26th of October, 1842, applies, although it is not sealed in the Clerk of Records and Writs Office. *Price v. Webb*, ii. 515

WRIT OF ASSISTANCE.

A party is entitled to a writ of assistance, under the 13th Order of August, 1841, to enforce obedience to a decree, although the memorandum, in the form prescribed by the 12th Order of August, 1841, indorsed upon the copy of the decree served, intimated that the party neglecting to obey it would be liable to process by attachment, *serjeant-at-arms*, or *sequestration*. *Bower v. Cooper*, ii. 412

WRITING.

See STATUTES, CONSTRUCTION OF, 7 Will. 4 § 1 Vict. c. 26.

YEAR'S WAGES.

A legacy of a "year's wages" cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks. *Blackwell v. Pennant*, ix. 554

FINIS.





